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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1928.

No. 17, Original.

Ex Parte: THE BAKELITE CORPORATION,
PETITIONER.

SUPPLEMENTAL BRIEF ON BEHALF OF THE BAKELITE CORPORATION, PETITIONER, ON THE SUBJECT OF THE CONSTITUTIONAL CHARACTER OF THE UNITED STATES COURT OF CUSTOMS APPEALS.

FILED BY LEAVE OF COURT GRANTED JANUARY 14, 1929.

The opinion of the Court of Customs Appeals in this case held that that court was a constitutional court under Article III, Section 1 of the Constitution.

This was not attempted to be controverted by any party when the case was before the lower court. It

was, therefore, deemed that the question was not of such importance in the present application as to require complete briefing. This view was confirmed by the brief of the Solicitor General and of the intervenor.

The memorandum attached to the Solicitor General's brief marked "H" was brought to our attention on the filing of that brief the day the case was set for argument.

As this court referred to the matters set forth in this memorandum on the argument, we desire to present the question more fully than it was presented in the original brief.

The main point raised by the memorandum in question is whether or not the Congress under the grants of power contained in the Constitution to create courts has the power of creating courts which are not inferior courts under Article III of the Constitution, but still exercise some of the jurisdiction of inferior courts as limited by Section 2 of Article III.

The intimation is that the Court of Customs Appeals is one of such a type of court rather than an inferior court under the Constitution. An examination of the terms of Article III shows that the Constitution provided that the judicial power of the United States shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish.

It provides that the judges of such courts shall (1) hold their offices *during good behavior*, and (2) receive a compensation which *shall not be diminished* during their continuance in office.

The first suggestion we make is that the question for decision *is not what Congress may do in reference to establishing judicial tribunals, but what it did do.* What kind of court did it intend to create and under what powers did it purport to act when it created the United States Court of Customs Appeals?

In order to arrive at the intention of Congress, in order to determine what it did do, it is not only proper, but highly important that all the applicable rules of statutory construction be resorted to. The context of the act of creation, similar acts of creation, the history of the times, the proceedings in Congress and reports of the committees of Congress, are in most instances, as here, illuminating as to the intention of the legislature.

I.

THE LEGISLATIVE HISTORY, THE CONGRESSIONAL DEBATES, AND THE REPORTS OF THE SENATE COMMITTEE ON FINANCE, WHICH COMMITTEE INITIATED THE LEGISLATION, INDICATE THAT CONGRESS INTENDED TO CREATE AN INFERIOR COURT UNDER ART. III OF THE CONSTITUTION.

So far as we have been able to observe, the legislative records of almost a century and a half afford no example of a court-creating statute which in terms states that Congress is thereby creating a legislative court, a constitutional court, or an inferior court. Notwithstanding this fact, the Supreme Court of the United States on numerous occasions has determined

the character of various courts created by Congress, some of which were declared to be legislative in character and others inferior in character, and by inferior we mean such courts as are authorized by Article III of the Constitution.

An examination of the legislative proceedings of Congress in connection with the establishment of the United States Court of Customs Appeals seems to us to be convincing, beyond a reasonable doubt, that the framers of the law had no other purpose in mind than to create an inferior court, the jurisdiction of which should extend to cases and controversies, a jurisdiction carved out of the then-existing constitutional judicial system, and whose judges should have tenure of office during good behavior and whose salaries should not be diminished during their continuance in office.

Let it be remembered that subsection 29 of section 5 of the Payne-Aldrich tariff act of August 5, 1909, found its way into the bill by amendment in the Senate, which bill was, with the amendment, accepted by the House. No committee report on this feature of the bill is found in any public document, for the reason above stated, but an examination of the Congressional Record of July 7, 1909, 61st Congress, 1st Session, Vol. 44, page 4320, discloses that Senator Flint, in charge of the subcommittee, and for the Committee on Finance, declared the nature and purposes of the court created by the amendment. This report of the committee and the speeches by senators of the committee in debate are filled with statements pregnant with meaning as to the character of the court proposed.

Senator Dolliver doubted the wisdom, at that stage of the proceeding, of not stopping to inquire whether "it is wise now to superimpose on the complex machinery of our customs tariff laws this new judicial tribunal, *with a life term of office*, unknown hitherto to our laws, and which starts out with a bill of expenses equal to the entire cost of maintaining the Supreme Court of the United States" (page 4308). He previously said:

> "Yet here we come with an agitation, arising I know not in what quarter, asking us to create a new court in the United States *with lifelong tenure*" (page 4307).

Senator Borah, who opposed the creation of a specialized court, said:

> "Mr. President, that can all be corrected by statute, without the creation of a new tribunal. A new tribunal will have no more to do with it than the present tribunals" (Circuit Courts and Circuit Courts of Appeal) "unless you do have a statute. * * * If there has been an unfortunate use of language in our statutes, it can be remedied here; but it certainly ought not to be remedied by creating a court which will interpret the law, not as it is written, but as some one supposes it was written" (pages 4310, 4311).

Senator Cummins opposed the amendment for the same reason (pages 4311, 4312).

Senator Clapp:

> "Yet for this small amount of business it is proposed to create a new court, to limit that

court to this particular work, and to so limit them that they can render the public no other service" (page 4309).

Senator Bailey, who favored the amendment:

"I think there is no class of cases about which we should be so deeply concerned, not only for a correct, but for a prompt decision, as customs cases. There are $330,000,000 involved in the customs collections throughout the country"; (Now there is nearly twice this amount.) "* * * Therefore, on this question of mere dollars and cents involved in the construction of the revenue laws of the country, I do not believe the Supreme Court's work ought to be increased by these appeals when it is already beyond the capacity of the most industrious justices to perform" (page 4317).

Senator McCumber:

"For that second reason it was thought best to have a court whose whole attention, whose *whole life work*, should be given to that particular subject. * * * It is a court of review or a court of appeals, whatever you may call it. It takes no original evidence; it acts only upon the question of the construction of the law and the application of that law to the peculiar technical cases that will be brought before it as evidenced by the record that will be sent up" (page 4319).

Senator Aldrich, Chairman of the Finance Committee, said:

"It is to secure the prompt, honest, and uniform administration of our customs laws; and in

my judgment, if we can secure this result, it will save the country and save the Government of the United States, and save the people of the United States millions of dollars" (page 4310).

In the report of the committee made by Senator Flint, beginning at page 4322, *supra*, we find, among other things, the following:

"Customs cases differ essentially from any other class of cases. Each of them is a question in which the whole country at large is interested. For they bear upon and directly affect the terms and administration of a law that affects every citizen of the land. It should not be regarded a criticism upon the courts of any circuit that the Congress, in its deliberation, should conclude to take from that circuit and place in a different jurisdiction cases previously within it. Congress creates courts; the Senate approves all judges; Congress devolves upon every court except the Supreme Court the jurisdiction of that court. It is within the plenary powers of the Constitution devolved upon the Congress to create, to add to, or to subtract from the jurisdiction of any court. It is the duty of Congress to vest these jurisdictions in such tribunals, to take them from the one tribunal, invest them in another, as in its opinion is for the best interests of the country. * * * *It is the constitutional prerogative of the Congress to create inferior federal courts.* It is the prerogative of the Congress alone to provide for the appointment of judges and to create their jurisdiction, (note the absence of the word *tenure*) to add to that jurisdiction, or to take

from it. It is the province of the judiciary alone to pass upon the cases confined to that jurisdiction by the Congress. It is for the judiciary to determine issues properly presented to them. It is for the Congress to determine what issues shall be presented before certain courts and what not. * * *. The committee believes these cases involve questions of national concern, * * *. Under the previous system of appeals in customs cases, the ultimate authority being the different circuit courts or circuit courts of appeal throughout the United States, a great lack of uniformity of decision resulted. * * * And it is the purpose of the committee in the presentation of this amendment to provide a tribunal with sufficient salary to secure in the personnel of this court judges of high attainments and understanding and to clothe them with duties not such as would require the rushing through of cases similar to that followed in police and justices' courts, but to have ample opportunities in cases of small moment, as well as cases of large moment, to thoroughly investigate not only the law, but all the facts surrounding the same, that their decisions, when rendered, may be intelligent and sound. * * * *It is the purpose of this bill to create a tribunal the jurisdiction of which will take the place of, and consign to its jurisdiction in all customs cases, that now covered by the United States circuit courts of appeal and in part the Supreme Court.* The amendment is framed upon the lines and carries with it the salary which will bring into this court and *retain men as judges of high legal attainments* who will be amply paid and can afford to bring to these important

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parenthetical clause ours.)

II.

THE ACT (SU SECTION 29, SECTION 28, ACT OF AUGUST 5, 19 09) PLAINLY INDICATES THAT CONGRESS INT ENDED TO CREATE AN IN- FERIOR COURT UNDER ARTICLE III OF THE CONSTITUTION

A consideration of the act creating the court shows plainly that the C ongress was attempting to create a court under its ge neral powers as outlined in Art. III of the Constitutio n. Its judges either were presumed to have a life tenu re by the Constitution, or they were given no tenure a l all by the Congress. The United States district a nd circuit judges might sit on the court. It might sit anywhere in the United States and its jurisdictio n was nationwide. It was a court of record with a sea a marshal, clerk, and other officers.

It might establish rules, issue writs, and exercise all other powers of a court. It had jurisdiction of matters theretofore heard by other inferior courts of the United States; the Supreme Court, in some cases, might review its decisions; its calendar must be called at stated intervals; after its organization, no appeal might be taken from the decision of the Board of General Appraisers to "*any other court.*" Its decisions are spoken of in the act as "judgments and decrees." (Italics ours.)

We have above called attention to the fact that no tenure of office is expressed in this statute. This is likewise true as to the District and Circuit Court Judges.

All the later acts in reference to the Circuit and District Courts are equally barren of any expression of the tenure of office of the judges (see 26 Stat. at L. vol. 26, p. 826, R. S. 1878, Title XIII, Chapter II, p. 93).

In this connection, attention is called to the fact that the only courts now existing in the United States the tenure of whose judges is not fixed by statute are the Supreme Court, the Circuit Courts of Appeals, the District Courts and the Court of Customs Appeals. This is highly significant and should have great weight in determining what kind of court was actually created in the Court of Customs Appeals.

In *McAllister* v. *United States*, 141 U. S. 174, the giving or withholding of tenure in the creation of a court was given controlling effect in determining the character of the court.

If Congress intended to create a commission, a board, an administrative tribunal, or a judicial tribunal other than a constitutional one, unquestionably it would have provided for the tenure of the judges as it has done in every instance where such a tribunal was created.

In view of these considerations, is it conceivable that the legislative body intended the creation of an administrative tribunal, the judges of which could be removed at the will of the President or of the legislative branch? The jurisdiction it was transferring involved a question of vast political and economic importance, highly controversial in character—the tariff.

Is it reasonable to conclude that it was the intention of the legislature to create a legislative judicial tribunal with no independence of character, the tenure of whose judges might depend upon the will of a hostile President or Congress? If such a construction was arrived at, it would strike at the very heart of the existing customs judicial system which, during the last twenty years has established an enviable record for uniformity of decision and expedition of business, unbiased by political or petty economic prejudices, the result of which has been the fullest realization of all of the hopes of the fathers of the law.

Is it believable that the Congress, which passed the act, and the President, who approved it, intended to take the whole customs judicial jurisdiction from the then-existing, independent, inferior judicial system and turn it over to a tribunal, temporary in character, the judges of which would be shorn of the independ-

ence and freedom of action which characterized the judges of the courts from which the jurisdiction was taken? Is it reasonable to presume that it was the legislative intent to put all final appeals involved in litigation arising from the highly controversial tariff question, in charge of a tribunal whose judges, if their tenure and salary was dependent upon Congress or the President, would not possess the independence and freedom of action intended by the framers of the constitution for courts handling federal matters of such vast importance?

The appellate jurisdiction of the Court of Customs Appeals is the same as that theretofore existing in the Circuit Court of Appeals in like cases. Its jurisdiction was distinctly carved out of the jurisdiction of the latter court. Surely the Circuit Court of Appeals was a constitutional court. It is unbelievable that in all the customs cases decided by it, and in many instances reviewed by the Supreme Court, they were passing upon matters outside of the jurisdiction of a Federal Court. For forty years the Supreme Court has been taking jurisdiction of these cases on appeal without any question that these are cases on which the Constitution granted power to the Federal Courts to pass.

III.

THE MATTERS TO BE HEARD BY THE COURT OF CUSTOMS APPEALS ARE CASES AND CONTROVERSIES.

The Supreme Court and the inferior courts created under Art. III of the Constitution must be limited in

their jurisdiction to cases or controversies. (*Liberty Warehouse* v. *Grannis*, 273 U. S. 70, 71). No difference exists between the Supreme Court and such inferior courts in this respect. *Postum Cereal Co.* v. *California Fig Nut Co.*, 272 U. S. 693. Such courts must be invested with such a part of the judicial power set forth in Article III as the Congress determines to give to them. The cases within its jurisdiction undoubtedly are comprehended within the phrase of cases "in law and equity, arising under this Constitution, the laws of the United States * * *;" "the controversies to which the United States shall be a party * * *".

The Court of Customs Appeals fulfills all the above requirements.

The cases it considers on appeal from the Customs Court (formerly the Board of General Appraisers) must be cases or controversies or else this court could hardly have failed to deny jurisdiction thereof in the cases that have been reviewed on certiorari to the Court of Customs Appeals and the Circuit Courts of Appeals for forty years.

That a decision of that court finally determines a controversy "to which the United States shall be a party" is, of course, not open to question.

That court, upon a case made below, enters a judgment either confirming a liquidation upon which duty has been collected or directing a reliquidation and refund of duty erroneously collected.

In reappraisement matters it finally determines (on questions of law) the value upon which ad valorem duties are computed.

In the case of American manufacturers' protests it determines the dutiable status of merchandise as between an importer and the American manufacturer. (See Sec. 516 of the Tariff Act of 1922). It determines "cases in law and equity arising under * * * the laws of the United States."

It must be remembered that the jurisdiction of the Court of Customs Appeals is territorially coextensive with the United States. The decisions it gives do not alone determine the rate of duty on a particular importation, but determine the status of that type of merchandise in regard to the duty it shall pay and hence will affect every person in the country dealing in or consuming such merchandise. When it is considered the vast amount of customs revenue collected, (more than a half billion dollars, involving importations valued at over four billions of dollars), all of which may be finally litigated in that court, it is clear that investiture thereof under the Constitution is the only way it can be established without an invasion of the rights of the people of the United States.

IV.

CONCLUSION TO BE DRAWN FROM CONSIDERATION OF THE LEGISLATIVE HISTORY AND TEXT OF THE ACT.

The Congress, by the Congressional debates and the reports of its committees, gave plain evidence that it considered it was creating an inferior court of the United States, under Art. III of the Constitution. By

the act, every bit of phraseology is indicative that such a court was created. In view of this, the inquiry presents itself:

If the Congress did not create, in the United States Court of Customs Appeals, an inferior court under its powers given by Art. III of the Constitution, what language could it have used to do so?

V.

OTHER RELEVANT LEGISLATIVE ACTS INDICATE THAT CONGRESS REGARDS THE COURT OF CUSTOMS APPEALS AS A CONSTITUTIONAL COURT, UNDER ART. III.

That the Congress intended to create an inferior court under its powers given by Article III of the Constitution, is further manifest from a consideration of the following:

First. The act of Aug. 5, 1909, creating the Court of Customs Appeals (36 Stat. 105) provided:

> "That in case of a vacancy or the temporary inability or disqualification for any reason of one or two judges of said Court of Customs Appeals, the President of the United States may, upon the request of the presiding judge of said court, designate any qualified United States circuit or district judge or judges to act in his or their place, and such United States judge or judges shall be duly qualified so to act."

Here, judges of admittedly inferior courts of the United States, under Article III of the Constitution

were directed to sit on said Court of Customs Appeals. If the matters of which said Court of Customs Appeals had jurisdiction were not cases or controversies, and if said Court of Customs Appeals was a mere legislative tribunal, then such assigned judges could not sit. *Heyburn's Case*, 2 Dallas, 409; *United States* v. *Ferreira*, 13 How. 39. Either the Congress knew it was assigning to such judges a duty which they could not perform, or the Congress felt that it was creating, in the Court of Customs Appeals, another inferior court of the United States, under the Constitution, where such judges might lawfully sit. That construction must be adopted which will give effect to every part of the legislation, if possible.

Second. The original act creating the Court of Customs Appeals was a part of the tariff act of Aug. 5, 1909. On March 3, 1911, the Congress passed an act entitled "An Act to codify, revise, and amend the laws relating to the Judiciary." (36 Stat. 1087.) In this act were included the laws relating to the various United States courts, namely, the District Courts, the Circuit Courts of Appeals, the Court of Claims, the Court of Customs Appeals, the Commerce Court, and the Supreme Court. Amendments of this act relating to the Court of Customs Appeals have been made thereafter, as amendments to the Judiciary Code. Act of Feb. 25, 1919, 40 Stat. 1156; Act of Sept. 14, 1922, 42 Stat. 837. In the first statute last above cited, fixing the salaries of the judges of the Court of Customs Appeals, the language is that said judges "shall receive salaries equal in amount to the salaries provided by

this act to be paid judges of the Circuit Court of Appeals of the United States."

This was a definite legislative recognition and enumeration of the Federal judicial system.

Third. By the act amending the Judiciary Code of Sept. 14, 1922, heretofore referred to (Sec. 18), it was provided that the Chief Justice of the Supreme Court might assign judges of the said Court of Customs Appeals to sit in the Court of Appeals or in the Supreme Court of the District of Columbia, and such assignments have been frequently made. While there may be doubt as to whether these district courts are inferior courts of the United States under Art. III of the Constitution, all will concede that they are Constitutional courts under Art. I, Sec. 8, Par. 17, and exercise a part of the judicial powers of the United States. *Keller* v. *Potomac Electric Co.*, 261 U. S. 428.

When the Congress thus directed these judges to sit in other constitutional courts, did it do so with the idea in view that they were mere legislative judges and members of a legislative tribunal? No such conclusion is a reasonable one.

It may be argued that the provisions of the Tariff Act of 1922 (316a), providing for an appeal from the United States Tariff Commission to the Court of Customs Appeals, being an attempted appeal of an administrative matter, is indicative of the Congressional idea that the Court of Customs Appeals was nothing but a legislative court. No such conclusion can safely

be drawn. The same section provided also for an appeal to the Supreme Court. If the Congress thought the Court of Customs Appeals a legislative court, by the same token it had the same opinion as to the Supreme Court. The Congress has on other occasions attempted to confer jurisdiction on the Supreme Court in legislative matters. *Postum Cereal Co.* v. *California Fig Nut Co.*, 272 U. S. 693. *Muskrat* v. *United States*, 219 U. S. 346. No conclusion can be safely drawn from such Congressional errors.

VI.

THE COURT OF CLAIMS, BY ANALOGY SIMILAR TO THE COURT OF CUSTOMS APPEALS, IS AN INFERIOR COURT OF THE UNITED STATES, UNDER ART. III OF THE CONSTITUTION.

An analogy may be drawn between the United States Court of Claims and the United States Court of Customs Appeals. Both were created as courts of special jurisdiction. If anything, there appears to be more reason for holding the Court of Customs Appeals to be an inferior court, under Art. III of the Constitution than is applicable to the Court of Claims. The Court of Claims was given alleged jurisdiction over matters referred to it by executive departments in cases where the claimant might have brought suit before such court. Sec. 1063, R. S. Whatever may be said as to these not being cases or controversies in the Court of Claims, no such power was given to the Court of Customs Appeals by the act creating it.

It must be considered, moreover, that the Supreme Court has never passed upon the legality of assigning such jurisdiction to the Court of Claims, as at present constituted.

There are more persuasive reasons why the U. S. Court of Customs Appeals is an inferior court under Article III, than there are for the Court of Claims. The former was, at creation, given only cases and controversies, the latter administrative matters, the judges of the former were made dependent upon the Constitution for tenure, the judges of the latter were given express tenure.

The Court of Claims has been held by the Supreme Court to be an inferior court of the United States, under Art. III of the Constitution. In *United States* v. *Klein*, 13 Wall. 128 (145), it was said:

> "The Court of Claims is thus constituted one of those inferior courts which Congress authorizes, and has jurisdiction of contracts between the government and the citizen, from which appeal regularly lies to this court."

Other cases are of similar tenor.

If it may be said that the language quoted in *United States* v. *Klein, supra,* does not use the term "inferior court" in the sense as used in Art. III of the Constitution, the answer to such statement may be found in *Miles* v. *Graham,* 268 U. S. 501. In that case Graham, one of the judges of the Court of Claims, sued the Collector of Internal Revenue to recover federal income taxes paid, claiming to be exempt therefrom under Sec. 1, Art. III, of the Constitution, which provides that the salaries of judges of the Supreme Court and

inferior courts of the United States "shall not be diminished during their continuance in office." The Supreme Court held the plaintiff to be entitled to recover and that he was not to be subjected to such tax.

The inquiry presents itself: If a judge of the Court of Claims is exempt from income tax, how can he be thus exempt except under Art. III of the Constitution? No other such exemption is provided by that document. If he is thus exempt under Art. III, then he must be created under that article. No one could logically contend that he was created under an implied power, or under some other clause of the Constitution and be entitled to the emoluments and exemptions provided by Art. III, for those judges only, who are to be created under this article.

Thus it appears that the Supreme Court has definitely settled that the Court of Claims is an inferior court, under said Art. III.

If it is such a court, by analogy, what reason presents itself why the Court of Customs Appeals should not be so considered?

VII.

THE CONGRESS, IN CREATING COURTS, CAN ONLY DO SO WHERE ESPECIALLY AUTHORIZED BY THE CONSTITUTION. THERE IS NO EXTRA-CONSTITUTIONAL POWER TO CREATE COURTS. ALL CONSTITUTIONAL COURTS OF THE UNITED STATES ARE COURTS OF LIMITED JURISDICTION.

The provisions of the Constitution fix the utmost bounds of the judicial power of the United States.

That jurisdiction can not be extended by legislative action. *Hodgson & Thompson* v. *Bowerbank et al.*, 5 Cranch. 303; *Scott* v. *Sandford*, 19 How. 393. Article III, section 1, of the Constitution provides that "the judicial power of the United States shall be vested in one Supreme Court, and such inferior courts as the Congress may from time to time ordain and establish." Article III, section 2, defines and limits the jurisdiction of the Federal Judiciary. It would seem to follow that, if the Congress can not extend the jurisdiction of the Federal Judiciary beyond the limits of the Constitution, it can not confer the judicial power of the United States (except as hereinafter mentioned) upon any other courts than those provided for in Article III, section 1, that is, "The Supreme Court and such inferior courts as the Congress may from time to time ordain and establish."

However, the Congress has the power, under Article I, section 8, paragraph 17, of the Constitution, to exercise "exclusive legislation" over the District of Columbia, and, therefore, may create courts for the District of Columbia. Under Article IV, section 3, paragraph 2, of the Constitution, the Congress has authority to make all needful rules and regulations respecting the territory belonging to the United States. Therefore, it may establish courts for such territory. The Congress has the power to confer upon such courts the combined jurisdiction of the Federal and of the State Courts. However no judicial power conferred upon the Federal Government by Article III, section 2, of the Constitution can be exercised *in the States* by any court other than the courts provided for in

Article III, section 1. *McAllister* v. *United States*, 141 U. S. 174 to 184 inclusive, quoting with approval from the case of *American Insurance Company* v. *Canter*, 1 Pet. 511, 546. There Chief Justice Marshall said:

> * * * Although admiralty jurisdiction can be exercised in the States in those courts only which are established in pursuance of the third article of the Constitution, the same limitation does not extend to the Territories. In legislating for them, Congress exercises the combined powers of the general and of a state Government.

If this is true as to admiralty jurisdiction, it is true as to the other eight classes of cases over which the judicial power of the United States extends.

The United States Court of Customs Appeals is a court of record and, of course, has no jurisdiction except that which is within the judicial power of the United States. Its jurisdiction is exercised in each of the states of the United States, and under the act creating it, *it may sit in any judicial district of the United States*. Its jurisdiction consists solely of cases and controversies arising under the laws of the United States; and extends to the construction of the Constitution and of treaties of the United States. The United States is nearly always a party. In view of the fact that it is neither a territorial court nor a District of Columbia court, and, as its jurisdiction is exercised in each of the States of the United States, it would seem, if we are to follow the law announced in the quoted excerpt from the opinion in the case of the *American Insurance Company* v. *Canter*, *supra*, that

the United States Court of Customs Appeals must be an inferior court of the United States. Obviously, if it is not an inferior court of the United States, established by virtue of Article III of the Constitution, it is not a court at all, except in name. In a great majority of the cases in this court no appeal may be taken to the Supreme Court except where a certificate of importance has been obtained from the Attorney General. Accordingly, if it is not an inferior court, then practically all of the justiciable questions within its jurisdiction are never submitted to a judicial tribunal. Obviously, then, the right of the citizen to submit justiciable questions (cases and controversies) to a Constitutional Court of the United States (a right which had always existed before the United States Court of Customs Appeals was established) is denied to him, unless, of course, it may be held that the United States Customs Court (the trial court for Customs cases) is a Constitutional Court.

It has been suggested that courts of the United States might be established, without regard to the provisions of the Constitution, by virtue of the right of sovereignty which exists in the Government of the United States. The answer is that the United States Government has no sovereign power over the states or the people of the United States, except that which has been conferred by the Constitution. And as to the States and the people thereof, the judicial power of the United States was expressly conferred and limited, both as to courts and as to jurisdiction, by Article III of the Constitution. Accordingly, there is and

there can be no sovereign or inherent power in the Government of the United States superior to that conferred by Article III.

The Court of Customs Appeals is a court of limited, not of general, jurisdiction, and this is true of every Federal Court. The courts in England and in the several states of the United States, however, are courts of general jurisdiction. *Scott* v. *Sandford*, 19 How. 393, 401. Not only is the jurisdiction of the Federal Courts limited by the Constitution, but that jurisdiction has been further limited by the failure of the Congress to confer upon the courts all of the jurisdiction provided for in the Constitution. *Turner* v. *Bank of North America*, 4 Dall. 6, 11. This being so, there is no reason for suggesting that, because a court established by the Congress is given a jurisdiction over a special class of justiciable questions, it is not an inferior court of the United States.

The term "inferior courts" relates to United States Courts established by the Congress pursuant to Article III, section 1, of the Constitution, and means those courts inferior to the Supreme Court of the United States. *Turner* v. *Bank of North America*, 4 Dall. 6, 11; *McCormick* v. *Sullivant*, 10 Wheat. 192, 199.

VIII.

SPECIAL COURTS, SUCH AS THE COURT OF PRIVATE LAND CLAIMS, ETC., ARE CLEARLY DISTINGUISHABLE FROM THE COURT OF CUSTOMS APPEALS.

The memorandum attached to the Solicitor General's brief refers specifically to the Court of Private

Land Claims, the Special Indian Court, and the Court of Claims. An examination of the statutes setting up the first two, these tribunals show that these courts were not attempted to be organized or created under Article III of the Constitution, but purely under the power of Congress to pass rules and regulations for the government of the territories of the United States.

The statute creating the Court of Private Land Claims is the Act of March 3, 1891, chapter 539, 26 Stat. at L. 854. Section 1 of that Act limits the tenure of office of the justices to December 31, 1895. Thus it could not be considered a constitutional court under Article III.

This statute was construed by this court in *United States* v. *Coe* (155 U. S. 76). The decision there was on a motion to dismiss for want of jurisdiction, but the motion to dismiss was denied because it was determined that the Private Land Court was a territorial court. The court says: "The case before us relates to the determination of a claim against the United States to lands situated in the territory of Arizona, and, as it was clearly within the authority of Congress to establish a court for such determination unaffected by the definitions of Article III, the question is not presented whether it was within the power of Congress to create a judicial tribunal of this character for the determination of title to property *situated in the States where the Courts of the United States, proper, are parts of the Federal System invested* with judicial power of the United States expressly conferred by the Constitution and to be ex-

pressed in correlation with the presence and jurisdiction of the several states courts and governments, citing *Hornbuckle* v. *Toombs* (18 Wall. 648, 655). (Italics ours.)

It may well be doubted whether in the light of *Liberty Warehouse* v. *Grannis* (*supra*), and other cases, this Court would now take jurisdiction under a statute which did not finally determine the ownership of land but only of the rights of the government, in reference to a claimant therefor.

Section 13 (5th) of said Act of March 3, 1891, reads "No proceeding, decree, or act under this Act shall conclude or affect the private rights of persons as between each other * * * but the proceedings, decrees and acts therein provided for shall be conclusive of all rights as between the United States and all persons claiming any interest or right in such lands."

If by the Indian Court referred to in the memorandum is meant the Act of March 1, 1889, Chapter 3, 33 Stat. at L. 783, it should be noted that the tenure of office of the judges is set at four years. This court also was undoubtedly established under the power of Congress to adopt all necessary regulations for the Government of territories, and not under Article III of the Constitution, nor under any implied power of Congress, but under the direct grant given Congress to govern the territories.

Insofar as the Court of Claims is concerned, *U. S.* v. *Klein* (13 Wall. 144) clearly sets forth the history of that court showing how when it was first organized it was not a court at all and finally after various enact-

ments of Congress it became invested with the powers of a Federal Court including the power of giving final judgment.

The fact that the Congress has attempted to give to the Court of Claims jurisdiction in administrative or advisory matters cannot take away from that court its character as an inferior Federal Court.

This court has held that inferior courts have no jurisdiction to decide such matters and merely because the Supreme Court has never had occasion to pass upon this clearly unauthorized jurisdiction is no reason upon which to predicate a theory of the right of Congress to set up courts outside the Constitutional limitations.

IX.

EXECUTIVE INTERPRETATION OF THE ACT CREATING THE COURT OF CUSTOMS APPEALS.

For nineteen years, the United States Court of Customs Appeals has been functioning as a useful and respected part of the judicial system of the country. During that time its presiding and associate judges have been commissioned by the President, with the approval of the Department of Justice, during good behavior. One of its judges, after eighteen years of service, has been retired, under the general retirement act, and is now drawing his compensation, by approval of the Department of Justice. Another such judge now serving on the District of Columbia Court of Ap-

peals, is eligible for retirement. If the Court of Customs Appeals be not an inferior constitutional court of the United States, then its judges are not entitled to retirement, as they were not given statutory life tenure (*James* v. *U. S.*, 202 U. S. 401), their salaries may be decreased at any time and themselves be removed from office, for partisan or other purposes. There is much doubt as to whether judges of other inferior Constitutional courts of the United States may sit with them and supply vacancies. The practical effect of such a construction is to destroy the court that Congress so carefully provided for in the act creating it.

CONCLUSION.

For the reasons given we respectfully urge that the United States Court of Customs Appeals is an inferior court of the United States, created under Art. III of the Constitution.

ALBERT MacC. BARNES, Jr.,
Attorney for the Bakelite Corporation,
Petitioner.

SAMUEL M. RICHARDSON,
Of Counsel.

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IN THE

Supreme Court of the United States

BAKELITE CORPORATION,

Petitioner,

v.

PRESIDING JUDGE AND THE ASSOCIATE JUDGES OF THE UNITED STATES COURT OF CUSTOMS APPEALS,

Respondents.

Ex Parte,

In the Matter of the Application

of

FRISCHER & CO., INC., RICHARD GANZ, doing business as RANDES IMPORTING COMPANY, TRANS-ATLANTIC WATCH COMPANY, INC., a New York Corporation, WESTERN BRIAR PIPE COMPANY, an Illinois Corporation,

Petitioners,

FOR LEAVE TO INTERVENE HEREIN IN OPPOSITION TO APPLICATION FOR THE ISSUANCE OF A WRIT OF PROHIBITION.

MOTION FOR LEAVE TO FILE PETITION TO INTERVENE, OR IN THE ALTERNATIVE, THAT THE UNDERSIGNED COUNSEL BE PERMITTED TO FILE A BRIEF AS *AMICUS CURIAE*.

Now comes the petitioners, Frischer & Co., Inc., Randes Importing Company, Transatlantic Clock & Watch Company, Inc., and the Western Briar Pipe Com-

pany, by Meyer Kraushaar, their attorney, and move for leave to file petition and brief annexed hereto in opposition to application for a writ of prohibition, or in the alternative, that the said brief may be filed as *amicus curiæ* and their counsel heard in support thereof upon the oral argument.

MEYER KRAUSHAAR,
Attorney for Petitioners,
Office & Post Office Address,
No. 51 Chambers Street,
New York, N. Y.

PETITION FOR LEAVE TO INTERVENE.

To the Honorable, The Chief Justice and Associate Justices of the Supreme Court of the United States.

Come now Frischer & Co., Inc., Randes Importing Company, Transatlantic Clock & Watch Company, Inc., and Western Briar Pipe Company, and give this Honorable Court to understand and be informed:

1. That on the 16th day of December, 1925, the Bakelite Corporation and certain of its subsidiaries and customers filed a complaint with the United States Tariff Commission, complaining of the existence of alleged unfair methods of competition and unfair acts in the importation of articles into the United States tending to injure their business of manufacturing and selling articles composed of synthetic phenolic resin, form C; said complaint being wholly based upon Section 316 of the Tariff Act of September 21, 1922, 42 Stat., L. 858, U. S. C. Title 19, Sec. 176.

2. The gist of the alleged unfair methods of competition and unfair acts is alleged to have been the infringement of certain basic patents expiring by limitation on December 6, 1926, U. S. Letters Patent No. 942,700, and U. S. Letters Patent No. 942,809. It is charged in this written complaint that the Bakelite Corporation and its subsidiaries are industries efficiently and economically operated in the United States, and that the effect or tendency of such alleged infringement was to destroy or substantially injure the same.

3. The United States Tariff Commission, acting under subdivision "f" of Section 316 of said Tariff Act, there-

upon recommended to the President that there is reason to believe that such articles were being offered for entry in violation of said section, and that the President request the Secretary of the Treasury to "forbid entry of synthetic phenolic resin, of form C, and articles made wholly or in part thereof until an investigation under Section 316 of the Tariff Act, sufficient for a full presentation of the facts involved, could be completed."

4. The President thereupon on the 26th day of April, 1926, acting on the recommendation of the Commission, directed the Secretary of the Treasury to forbid such entry and the Secretary of the Treasury, complying with the order of the President, did by proclamation, order and direct that such articles be excluded from entry into the United States.

5. That thereupon pursuant to the provisions of subdivision "e" of said section, the United States Tariff Commission instituted an investigation and published notice in which it proclaimed the receipt of the complaint aforesaid and directed all persons interested to show cause at a public hearing at its office at Washington, D. C., on May 24, 1926, why the provisions of Section 316 of the Tariff Act should not be enforced and further gave notice to persons interested that they would be given an opportunity to produce evidence and be heard in reference to the subject matter of the investigation.

6. Thereupon the petitioners herein, Frischer & Co., Inc., *et al.*, complying with the direction of the Commission, filed a written answer in which they denied the material allegations of the complaint and set up affirmatively that the Bakelite Corporation and its subsidiaries and those acting in concert with them did not maintain

in the United States efficiently and economically operated industries, but on the contrary, that the Bakelite Corporation maintained and controlled a monopoly of articles made of synthetic phenolic resin, form C, and engaged in unfair trade practices heretofore condemned by Acts of Congress and interstate commerce laws.

7. That in the said answer they further charged specifically that the *alleged patent rights upon which the proceedings were based were invalid or in any event were not infringed by any of the answering respondents.*

8. The jurisdiction of the Commission was contested in two vital particulars: (a) on the ground that the Tariff Commission had no jurisdiction to pass upon the validity, construction or infringement of patent rights and that this jurisdiction was vested by law solely in the District Courts of the United States; (b) that Section 316 of the Tariff Act constitutes an unlawful delegation of legislative or judicial powers to ministerial or executive officers and was therefore unconstitutional and void.

9. Thereupon, public hearings were held in the City of Washington, D. C., at which both the attorneys for the Bakelite Corporation and the attorneys for the answering respondents participated and at which witnesses were heard on both sides, the hearings being concluded on the 12th of June, 1926, and the Commission entertained briefs.

10. That six months thereafter, on December 22, 1926, the Commission made an *ad interim* report to the President in which it recommended that the embargo or order forbidding entry above described be modified in view of the expiration of the basic letters patent above set forth, so that thereafter only such articles made of

synthetic phenolic resin, form C, be forbidden entry as are "composed of different colored sections of a phenolic condensation product joined together by applying a fusible phenolic condensation product to the sections to be joined, which fusible product has been converted to the infusible state by means of heat or heat and pressure as described in United States patent No. 1,424,738."

11. Notice of the report coming to attention of the answering respondents, a petition was presented by them in which they called the attention of the Commission to the fact that the U. S. Letters Patent No. 1,424,738 had never been litigated before the Commission and only had come to the attention of the Commission incidentally in the course of the investigation affecting the base patents, which by its terms had expired as above provided, and in view of these facts the petitioners asked that the proceedings either be entirely dismissed or be re-opened in order that proof might be taken in connection with the U. S. Letters Patent No. 1,424,738, reserving all rights in connection with the constitutional and jurisdictional questions raised at the outset of the proceedings.

12. Thereupon, the Commission ordered the institution of a new proceeding in connection with the investigation of the alleged infringement of U. S. Letters Patent No. 1,424,738, and counsel for the Bakelite Corporation as well as the answering respondents were again heard at length and testimony taken and further briefs again submitted.

13. On May 25, 1927, the respondents received a copy of the report of the United States Tariff Commission containing alleged findings and recommendations to the President of the United States.

14. The Tariff Commission is composed of six members appointed under Chapter 463 of the Act of September 8th, 1916, Sections 91 to 106, of Chapter 2, Title 19, U. S. C. A. By the provisions of this act, the President is authorized to appoint the membership of this Commission with the advice and consent of the Senate, "not more than three of whom shall be members of the same political party." In making said appointments, "members of the different political parties shall alternate as nearly as may be practicable." No provisions are made in the act for the number intended to constitute a quorum, but obviously it was the intention of Congress that the Tariff Commission shall consist of a non-partisan fact finding commission possessing quasi-judicial powers. The so-called report above described was signed by only three members of the Commission and not by a majority thereof, the fourth member, Commissioner Costigan, writing a dissenting opinion as follows:

> "Dissent from the foregoing opinion, findings and recommendations of Commissioners Marvin, Dennis, and Brossard must be recorded. There are persuasive reasons for concluding that Section 316 of the Tariff Act of 1922 was not designed, as the foregoing findings in effect hold, to enlarge patent monopolies through the aid of embargoes in cases where, as here, the validity and infringement of the patents in question have been denied and duly put in issue in the Tariff Commission's investigation, and it develops that such validity has not been upheld by the courts. The Tariff Commission is ill-equipped to give interested parties an adequate day in court in technical patent causes, and grave doubt must attend any construction of the present law which invests that Commission with jurisdiction, similar to that conferred on District Courts of the United States, to try and

determine such contested causes. Otherwise stated, there is scant reason to conclude that the Congress, in approving Section 316 of the Tariff Act of 1922, empowered or intended to empower the Tariff Commission, as held in the foregoing opinion and findings, to try and determine unresolved issues with respect to the validity, or invalidity and the infringement or non-infringement of United States patents; or, as affirmed in such opinion and findings, to assume the validity, though expressly challenged, of United States patents in the absence of any controlling decision with respect to such validity by a court of competent jurisdiction. If the specified findings are erroneous, the ensuing recommendations, numbered 1 and 2, of Commissioners Marvin, Dennis, and Brossard, of exclusion of goods from entry into the United States must be rejected.

Furthermore, it is my judgment and finding that the present investigation fails to establish one essential prerequisite of the granting of the relief sought by complainants, namely, that the United States industry which produces synthetic phenolic resin of form C, and articles manufactured wholly or in part thereof, was during the Tariff Commission's investigation or now is economically operated.

It is submitted that upon the present record the temporary orders of the Secretary of the Treasury of April 26, 1926, and December 7, 1926, forbidding entry of the articles therein mentioned pending the completion of this investigation, should be revoked, and the requests of the complainants for further action in their behalf under Section 316 should be denied."

The fifth member of the Commission, to wit, Commissioner Dixon, announced in a short sentence that he concurred with Commissioned Costigan in holding that the

Commission was without jurisdiction to pass upon contested patent questions, but nevertheless concurred in so much of the report signed by the three members, which held in effect that articles made wholly or in part of synthetic phenolic resin, form C, be excluded from entering the United States unless "it is clearly and unmistakably shown by means of a distinguishing mark, name, inscription, or label placed upon said articles or attached thereto, that said articles are not made from synthetic phenolic resin, form C, manufactured by the Bakelite Corporation, or unless said articles are otherwise reasonably distinguished so as to prevent confusion between the imported and the domestic articles on the part of the purchasing public."

15. It is to be noted at this time that the prevailing report in question contains a concession that no importer had misbranded his commodity and that there was no charge of misbranding, but the prevailing report nevertheless held and recommended that the articles be excluded from entry on the ground that the same constitutes an infringement.

16. The prevailing report held that the Commission had jurisdiction to pass upon questions affecting patent rights and infringements and that with respect to such articles thereafter to be imported, which had heretofore been covered by the expired patents that they be excluded unless they are marked in the manner above provided.

17. In the meantime, and while these proceedings were pending, and before the report to the President was made, the importers under the provisions of subdivision "f" of Section 316 secured a permit from the Secretary of the Treasury to permit entry of goods im-

ported, under bonds; the form and penalties were fixed by the Secretary of the Treasury and such importations have been continuous and uninterrupted since that time.

18. The effect of the findings of the three members of the Commission, if the same are subsequently adjudicated to be valid and binding upon the president, will be to produce a forfeiture of said bonds and involve the importers in large and substantial damages, the amount of which at this time cannot be fully ascertained.

19. Acting in pursuance of the provisions of subdivision "e" of said section, an appeal was then taken by the importers to the United States Court of Customs Appeals in the manner as such appeals are taken from decisions of the United States Board of General Appraisers (now the United States Customs Court), upon thirty-five written assignments of error, the salient features of which are:

(a) The section of the act in question is unconstitutional for the reason that the same constitutes an unlawful delegation of legislative power to ministerial and executive officers.

(b) That the Tariff Commission was without jurisdiction to pass upon and adjudicate the scope, validity, construction or infringement of contested letters patent.

(c) That the complaining industry is a monopoly and is not efficiently and economically operated and maintained.

(d) That as a matter of fact such importations are not an infringement of such patent rights.

(e) That there were no unfair methods of competition or unfair acts in the importation of the articles in question.

(f) That the Commission refused to receive competent evidence and received incompetent proof, which in effect resulted in unfair hearing to the importers.

(g) That the report itself is null and void, in that it was not signed by a majority of the members of the Commission as intended by law, it being signed by only three members thereof.

20. That thereupon a record containing more than 1,000 pages was printed at a large expense to the importers and that the case thereupon was ready to be briefed and argued.

21. Before the time for the filing of briefs had expired, counsel for the Bakelite Corporation thereupon made application to the United States Court of Customs Appeals to dismiss the appeal, contending that so much of the statute which gave the importers a right of appeal was unconstitutional and void for the reason that the matter in question was not a "case" or "controversy" within the meaning of Section 2 of Article III, of the United States Constitution, and that Congress could not constitutionally delegate the power of review to an inferior court established under the constitution, and that the United States Court of Customs Appeals was such an inferior court. The plain purpose of that proceeding was to prevent the court from reviewing the acts of the Tariff Commission and thus to secure without a review the benefits of the statute and to destroy the business of the importers.

22. Bearing in mind that the importers had themselves contested the validity of the substantive portions of the statute, this court will at once note that the importers were placed in an anomalous position in having to defend

the constitutionality of the measure in order to secure the right of a court review.

23. Before the United States Court of Customs Appeals, your petitioners contended and still contend that the right of appeal created by statute is an integral portion thereof, the destruction and nullification of which would of necessity destroy all the remaining provisions of Section 316. It was maintained that Congress never intended to place so great an economic weapon as the embargo in the hands of the executive department of the Government without the check or guidance of an impartial court of law. To hold that one part of the statute may be given life whereas the other must be excised would plainly defeat the manifest purpose of Congress. Hence the statute must be so construed if possible as to render each and every one of its provisions constitutional, valid and enforceable, as otherwise the entire legislation in question must be struck down. *All parties concede that the United States Court of Customs Appeals is an inferior court established under and in pursuance of Section 1 of Article III of the Constitution of the United States, and that unless the matter in question was a "case" or "controversy" within the meaning of Section 2 of Article III that that court would have no jurisdiction.* Your petitioners contend that the matter in question is a "case" or "controversy" instituted by the Tariff Commission on the one side against the importers on the other, and that the subject matter involves a matter of public right upon which the judicial power of the government is capable of acting.

24. That in the Court of Customs Appeals the importers or appellants made a counter motion to strike out

the appearance of the Bakelite Corporation on the ground that it was not a party to the record and that it had been inadvertently brought in.

25. On the 25th of May, 1928, the United States Court of Customs Appeals made an order denying the motion of the Bakelite Corporation to dismiss for want of jurisdiction and overruled your petitioners' motion to strike out the appearance of Barnes, McKenna & Halstead for the appellees, rendering an opinion reported in 16 Ct. Cust. Appls. , 53 Treasury Decisions , T. D. 42827, which has been submitted to this court annexed to the brief for the Bakelite Corporation in this proceeding.

26. That thereupon the Bakelite Corporation filed a petition for certiorari which is still pending, at No. 389, upon which a brief in opposition has been filed, in which it is contended that the petition for certiorari is premature and cannot be entertained by this court at this time. This court has nevertheless entertained a petition for a writ of prohibition and has directed the Presiding Judge and Associate Judges of the United States Court of Customs Appeals to file a return of their proceedings in printed form returnable on the 29th day of October, 1928.

27. It is at once manifest that the rights and property interests of your petitioners are now greatly jeopardized by these proceedings and if these proceedings can be successfully maintained and a writ of prohibition issued your petitioners will be deprived of a right expressly granted by statute to them to appeal and have the matter reviewed in a high court of justice and that if such appeal is in that manner frustrated, your petitioners will suffer great and irreparable damage and injury.

WHEREFORE, your petitioners respectfully pray that they may be permitted to intervene and become parties to this proceeding and that this court permit their counsel to be heard in oral argument, and that in any event that this court entertain the annexed brief, either as parties to this proceeding or as *amicus curiae*, in support of this application and in opposition to the issuance of a writ of prohibition.

Respectfully submitted,

MEYER KRAUSHAAR,
Attorney for Petitioners.

I have read the foregoing petition by me subscribed and the facts therein stated are true to the best of my information and belief.

Subscribed and sworn to before me,
this 25 day of October, 1928. Meyer Kraushaar

FLO HUBER
NOTARY PUBLIC, Genesee County
N. Y. Co. Clk's No. [illegible], Reg. No. [illegible]
Kings Co. Clerk's No. [illegible], Reg. No. [illegible]
Queens Co. Clerk's No. [illegible], Reg. No. [illegible]
Bronx Co. Clk's No. 10, Reg. No. [illegible]
Certificate filed in Kings Co.
My Commission expires March [illegible]

BRIEF IN SUPPORT OF APPLICATION TO INTERVENE AND IN OPPOSITION TO PETITION FOR WRIT OF PROHIBITION.

Propriety of Granting Application to Intervene.

This court *In the Matter of the Petition of The Indiana Transportation Company for Writ of Prohibition*, 242 U. S. 281, has laid down the rule that the essential party respondents in a proceeding such as this are the judges against whom the rule is issued, but that when the return to the rule is made, either by the authority of the judges "or because of their interest in the result, or as friends of the court, the persons to be adversely affected by the granting of the relief prayed may be heard to sustain the sufficiency of the return when that subject arises for consideration."

Since it is manifest from the foregoing petition that the real parties to be affected by an adverse result are the importers, it is respectfully suggested that this court permit them to be made parties to this cause, or in the alternative, that their counsel be heard as a friend of the court, and if so heard, that the following brief in opposition to the issuance of a writ be considered by this court.

Statement.

At this writing we have not before us a copy of the return of the Honorable Presiding Judge and Associate Judges of the United States Court of Customs Appeals, but we may assume since it is a matter of record, that the return will contain the essential facts and circumstances set out in the foregoing petition.

It will be noted that the proceedings were begun before the Tariff Commission upon the complaint of the Bakelite Corporation. There is no express warrant in the statute—Section 316 of the Tariff Act—for the complaining person to be deemed a party to the proceedings. The statute merely authorizes third parties to complain, but the Commission may act upon its own initiative.

Representation before the Commission has nevertheless been accorded the complainants. The statute does not expressly authorize it. It must therefore be assumed that the counsel representing them appear before the Commission purely as a matter of courtesy. On the other hand, the importers are expressly accorded the right to appear and be heard. No appeal by the statute is given to the complaining parties, but such a right of appeal is given to the "*importer or consignee of such articles*".

The right of the Bakelite Corporation to appear in the United States Court of Customs Appeals was challenged by the importers or consignees, but that application was overruled by the same order by which the jurisdiction of the court to entertain an appeal from the findings of the Tariff Commission was sustained. While it is therefore clear that the Bakelite Corporation is not the proper party to institute this proceeding and thus to protest against the assumption of jurisdiction by the United States Court of Customs Appeals, we do not seriously press the point, as we believe that it is to the interest of all concerned that the question be set at rest at the earliest practicable moment. To refuse to face the question now may only mean to saddle the burden of protracted litigation which may ultimately prove abortive upon the real parties in interest.

The complainants before the Tariff Commission took full advantage of the benefits of Section 316 of the Tariff

Act and now adopt the inconsistent position of maintaining that an integral, substantial and organic portion of the statute which gave this proceeding life is null, void and unconstitutional and nevertheless maintain that this court may excise from its provisions this important member and yet permit the body of the statute to stand unaffected. There is nothing suggestive in their brief of the importance of the right of appeal granted by Section 316 of the Tariff Act to the importers or consignees of the articles affected thereby, but it is plain that this section of the Tariff Act would never have been passed by Congress unless this important right was regarded as essential to its validity. (See Appendix containing extract from Senatorial debate.)

It is contended, notwithstanding the statute in so far as it grants an appeal to the courts is void because the matter before the Tariff Commission was not a "case" or "controversy" under Section 2 of Article III of the Constitution of the United States and therefore Congress could not have competently vested jurisdiction in the United States Court of Customs Appeals, because that court is an inferior court established under Section 1 of Article III. The jurisdiction of all federal courts is limited to "cases" or "controversies". We concede that the United States Court of Customs Appeals is an inferior court established under Section 1 of Article III of the Constitution. We have never doubted this. But if doubt can be entertained, in our judgment the opinion of Judge Bland below clearly and cogently resolves that question in favor of the contention that that court is such an inferior court. We maintain, however, that the cause before the Tariff Commission and the United States Court of Customs Appeals is a "case" or "controversy" within the meaning of the constitutional limitation above

described, because to construe the statute otherwise and to hold that the statute requires that court to act in an administrative or advisory capacity would mean not only to strike down the alleged objectionable right of appeal but to render unconstitutional and void in each and every one of its other aspects the provisions of Section 316 of the Tariff Act, and that by applying the well settled principle that if the statute is possible of another interpretation of a constitutional character such interpretation must be adopted, we claim that it is possible so to construe the statute as to render it constitutional in all its parts, as we shall hereafter demonstrate. If, on the other hand we err in this, in the interest of justice and fair play, we ask this court to so construe the statute as to leave no room for doubt that if the objectionable feature is unconstitutional and void *the whole statute must fail and be rendered entirely inoperative.*

ARGUMENT.

POINT I.

The investigation under Section 316 of the Tariff Act is a "case" or "controversy".

The provisions of Section 316 of the Tariff Act are set out at length in the brief for the petitioner at pages 32-34. It may also be found in the appendix hereto.

By this statute a new substantive right was created and a novel procedure adopted for the enforcement of that right. The substantive right was to declare unlawful the importation or sale by any owner, importer or consignee of any articles imported from abroad by any unfair methods of competition or unfair acts, the tendency of which is to destroy or substantially injure or prevent the establishment of an industry efficiently and economically operated in the United States, or to in any wise monopolize trade in such article. To prevent such unlawful methods, two remedies are provided: (1) to increase the duty on such imported articles to the extent of not more than 50% ad valorem in order to offset any wrong perpetrated, or (2) in extreme cases, to exclude them all together from entry.

In order that the taxing power or the power of embargo might not be abused to the detriment of innocent parties, a machinery was set up by the statute by which such a wrong, much graver than the original evil might be avoided. There is provided a public hearing before a so-called impartial, non-partisan, fact-finding body, to wit, the United States Tariff Commission. An appeal is pro-

vided the importer or consignee from the findings of that body to a high court already established by Congress, and that court is clothed with power to review the findings and declare the law, and if this were not enough, in order to insure against error, a discretionary review by this court is expressly provided for by the grant of jurisdiction to review by certiorari. But it is said that the Tariff Commission is purely administrative and possesses no judicial power; the President of the United States is not bound by their findings; that he may ignore these findings at will and notwithstanding that the Commission may have held that the fact may not constitute a violation of the statute, the President may hold otherwise and may overrule the Commission. Indeed, the counsel for the Bakelite Corporation goes further and maintains that the judgment of the United States Court of Customs Appeal declared final by statute is not even binding upon the president and is only advisory in character.

A cursory examination of the statute might lend support to this view. Indeed, Senator Walsh of Montana condemned the statute as unconstitutional on that express ground, saying:

> "I need not say that upon principles of the law frankly conceded upon the other side of the Chamber this section can not possibly be sustained as a constitutional exercise of the power of Congress." (Congressional Record, 67th Congress, 2d Session, August 11, 1922, p. 11241).
>
> "I have had no opportunity to examine the statute to which the Senator from North Dakota makes reference. In some of its features, at least, it is easily sustained by the case of Field against Clark. I do not undertake to state, however, that it could be sustained by that decision nor that it could be sustained at all. Indeed, in the case of

> Field against Clark the Supreme Court referred to many statutes which had been passed which seemed to confer upon the President discretionary power. They merely so remarked, without undertaking to say that upon an inquiry into any particular one of those statutes it might not be found to be violative of the Constitution. That seems to be no answer at all to the argument." (Congressional Record, 67th Congress, 2d Session, August 11, 1922, p. 11243).

The question of the right of Congress to abdicate its legislative functions in favor of the executive department of the government has been so often before this court that it would seem most unnecessary for counsel to brief the question. We content ourselves, however, with drawing this court's attention to the most recent case of *J. W. Hampton, Jr. & Co.* v. *United States*, 48 Sup. Ct. 348, in which the learned Chief Justice cites all the pronouncements of this court in the interpretation of the principle and holds constitutional the provisions of Section 315 of the very same act here under review. In that case this court again sustains the principle that Congress cannot constitutionally delegate purely legislative functions to ministerial officers, but that the delegation of discretion to such officers "to make public regulations interpreting a statute and directing the details of its execution, even to the extent of providing for penalizing a breach of such regulations" *within defined limits* is not unconstitutional.

Nor is it unconstitutional, as in *Marshall Field & Co.* v. *Clark*, 143 U. S. 649, 12 Sup. Ct. 495, for Congress to delegate to the president the power as *its agent to ascertain and declare the event upon which its expressed will was to take effect*. To say that the president, when such

events has been ascertained and declared, might disregard the legislative command and say that the statute is not to operate or that the legislative will is not to become effective or to vest in the president unrestrained discretion without limitation, to secure or not to secure the effect of legislation, or to make regulations binding or not binding in his discretion would be clearly a delegation of purely legislative functions to the president.

In *Marshall Field & Co.* v. *Clark*, (*supra*), this court had before it the construction of the Tariff Act of June 10, 1890. The particular provision of this statute which was attacked was Section 3, which was passed with a view to securing reciprocal trade with countries producing certain articles and the president was given the power *when he may deem certain* imports to be reciprocally unequal, and unreasonable, to suspend by a proclamation to that effect the provisions of the act relating to free introduction of certain articles and during the period of such suspension to impose certain fixed duties which may be levied by the United States.

The counsel for the appellant argued that the language of the statute, *viz.*, the phrase the "president may deem," invested the president with unrestrained discretion in the premises and gave him the right to say whether that law may be suspended or not at will. Indeed, the minority opinion by Mr. Justice Lamar, concurred in by Mr. Justice Fuller, adopted this view. Said Mr. Justice Fuller:

> "It goes further than that and deputes to the president the power to suspend another section in the same act whenever 'he may deem' the action of any foreign nation producing and exporting the articles named in that section to be 'reciprocally unequal and unreasonable'; and it further deputes

> to him the power to continue that suspension and to impose revenue duties on the articles named 'for such time as he may deem just.' This certainly extends to the executive the exercise of those discretionary powers which the constitution has vested in the law-making department. It unquestionably vests in the president the power to regulate our commerce with all foreign nations which produce sugar, tea, coffee, molasses, hides, or any of such articles; and to impose revenue duties upon them for a length of time limited solely by his discretion, whenever he deems the revenue system or policy of any nation in which those articles are produced reciprocally unequal and unreasonable in its operation upon the products of this country.
>
> These features of this section are, in our opinion, in palpable violation of the constitution of the United States, and serve to distinguish it from the legislative precedents which are relied upon to sustain it, as the practice of the government."

The majority opinion, however, adopted the view that there was nothing discretionary in the statute. Mr. Justice Harlan thus wrote:

> "*Nothing involving the expediency or the just operation of such legislation was left to the determination of the president.* The words 'he may deem' in the third section, of course implied that the president would examine the commercial regulations of other countries producing and exporting sugar, molasses, coffee, tea, and hides, and form a judgment as to whether they were reciprocally equal and reasonable, or the contrary, in their effect upon American products. But when he ascertained the fact that duties and exactions reciprocally unequal and unreasonable were imposed upon the agricultural or other products of the United States by a country producing and exporting sugar, molasses, coffee, tea, or hides, it became his duty

> to issue a proclamation declaring the suspension, as to that country, which congress had determined should occur. He had no discretion in the premises except in respect to the duration of the suspension so ordered. But that related only to the enforcement of the policy established by congress. As the suspension was absolutely requested when the president ascertained the existence of a particular fact, it cannot be said that in ascertaining that fact, and in issuing his proclamation, in obedience to the legislative will, he exercised the function of making laws. Legislative power was exercised when congress declared that the suspension should take effect upon a named contingency. What the president was required to do was simply in execution of the act of congress. It was not the making of the law. He was the mere agent of the law-making department to ascertain and declare the event upon which its expressed will was to take effect. It was a part of the law itself, as it left the hands of Congress, that the provisions, full and complete in themselves, permitting the free introduction of sugar, molasses, coffee, tea and hides, from particular countries, should be suspended in a given contingency, and that in case of such suspension certain duties should be imposed." (Italics ours.)

Nothing is better settled in law than that when a statute is capable of two constructions, one which would render it constitutional, and the other unconstitutional, the one which would render it constitutional must prevail. Another principle to be borne in mind in statutory construction is that where a statute confers power to act or clothes a public body or officers with power to perform acts which concern the public interest or the rights of individuals, although the language is permissive merely, it will nevertheless be construed as imposing duties rather than con-

ferring privileges and will therefore be regarded as mandatory (36 *Cyc.* 1159). So the general rule is that the word "may" ordinarily used in a statute is permissive only, and operates to confer discretion. While the words "shall" and "must" are imperative operating to impose a duty, which must be enforced. These words, however, are constantly used in statutes without regard to their literal meaning.

Fields v. *U. S.*, 27 App. Cases 433; certiorari denied, 205 U. S. 292; 27 Sup. Ct. 543.

Thus the word "may" will be construed to be mandatory whenever the public or individuals have a claim *de jure* that the power conferred should be exercised or whenever something is directed to be done for the sake of justice or the public good. So the word "shall" is construed as merely permissive where no public benefit or private right requires it to be given an imperative meaning (see 36 *Cyc.* 1160-1161).

In *Brian* v. *Moore*, 81 Ind. 9, at page 12, the Court held that the phrase "become satisfied" as used in the statute providing, that if the Board of Commissioners *became satisfied* that a proposed drain is a public utility they shall appoint appraisers who shall assess the land affected, means that if the Board is convinced or the Board finds that the work contemplated is a public utility, they shall appoint appraisers. The statute does *not confer discretionary powers*, but *imposes a judicial duty on the Board to hear* and determine the question of public utility on the contemplated work.

In *State* v. *Cohen*, 73 N. H. 543; 63 Atl. 928, involving a statute granting the city officials the right to license persons "deemed by them to be dealers in junk, etc.," the

Court adopted the theory that such statute should be construed as merely granting the right to exercise a reasonable discretion in determining who were "suitable" persons, and not as granting an arbitrary and uncontrolled power of discriminating between applications for licenses to deal in junk. In holding that that statute was not unconstitutional, the Court reasoned as follows:

> "The defendants' objection to the statute is not so much on account of absence of power in the legislature to enact any statute on the subject, as it is on account of the provisions of this particular statute. He says that it confers upon the Mayor and Alderman of Cities and the Selectmen of Towns authority arbitrarily to determine who shall engage in the business and where the businesses shall be carried on. If this were the true interpretation it might be that the statute was unconstitutional. But the defendant is in error here, also * * *. The theory on which the statute was framed was that the protection which it was thought the public required would be obtained by allowing 'suitable persons' only to engage in the business, and having it definitely known where the business was to be transacted. To carry the theory into effect, it was necessary to clothe someone with authority to determine who were 'suitable persons,' persons possessing the requisite sobriety, integrity and respect for the welfare of the community to be safely intrusted with the control of a business having such possibilities of danger to the safety and welfare of the public. The legislature delegated the performance of this duty to the mayor and aldermen and selectmen. These officers were not to license persons generally or such persons as they saw fit, but only 'suitable persons.' There is nothing in the statute having the least tendency to show an intention that there was to be any discrimination among 'suitable persons' or

> that any persons were to be adjudged unsuitable excepting those who, in the conduct of the business, would probably defeat or attempt to defeat, the purpose of the legislature in requiring a license. All suitable persons who applied were to have licenses. The provision was not intended as a grant or arbitrary power, but only as the imposition of a duty upon those officers, to be performed by an impartial exercise of a reasonable discretion. There can be no doubt of the legislature's power to delegate the duty to these officers, and by doing so, they violated no provision of the Constitution."

In this proceeding, to permit the statute to be so construed that the president may disregard the findings of the Tariff Commission and its recommendations, and make his own findings in the premises as he may deem just and that the president may disregard the judgment of this Court, reversing the findings of the Tariff Commission, or confirming them, as the case may be, would render this statute inoperative, as it would apparently violate the principle that Congress had no power to delegate such power to the president.

With these principles in mind, let us again examine the statute to see whether it is possible to so construe it as to render effective the intent of Congress and at the same time free it of any imputation of illegality because of conflict with organic law. It was the manifest intent of Congress not to protect any particular person from unfair methods of competition, but to protect American industries and their public aspect from being undermined from such methods of importation. This policy was not entirely new.

In the Act of September 26, 1914, 38 Statutes at Large, 717, Sections 41, 45, *et seq.*, Title 15 U. S. C. A. the Fed-

eral Trade Commission was established. This Commission is composed of five members appointed by the president with the advice and consent of the Senate. By Section 45 the Federal Trade Commission is given the power and directed to prevent persons, partnerships or corporations, except banks and common carriers, subject to acts to regulate commerce, from "*using unfair methods of competition in domestic commerce.*" Under the provision of that law a comprehensive procedure is set up whereby the Trade Commission may of its *own initiative*, or *upon a complaint filed* against an offender, after first affording him an opportunity to be heard, make a report containing the necessary findings of fact, and an order requiring said person, partnership or corporation "to cease and desist from using such unfair methods of competition." If the offender fails or neglects to obey the Commission, the Commission may apply to the Circuit Court of Appeals of the United States, within any Circuit where the method of competition in question is used, for the enforcement of this order. If the Court, upon review, finds the findings of the Commission just, it has the power to make a final judgment directing the enforcement thereof.

A writ of certiorari may be granted to this court.

Procedure is also provided for an appeal from an order of the Trade Commission by a party aggrieved.

It is therefore similar in practically all of its functions to that of the Tariff Commission, except that the Tariff Commission *directs its activities against importers*, whereas the Federal Trade Commission is limited in its power to domestic commerce.

The Federal Trade Commission has been held not to be a court, and it exercises administrative, not judicial, power (*Eastman Kodak Co.* v. *Federal Trade Commis-*

sion, 7 Fed. (2nd) 994, affirmed *Federal Trade Commission* v. *Eastman Kodak Co.*, 47 Sup. Ct. 688; *American Tobacco Co.* v. *Federal Trade Commission*, 9 Fed. (2nd) 570, affirmed 47 Sup. Ct. 663).

Thus it has been held that Congress, in failing to define the term "unfair methods of competition," left the question of ultimate determination as to the meaning of the phraseology to the court (*Federal Trade Commission* v. *Gratz*, 253 U. S. 421, 40 Sup. Ct. 572; *Sears Roebuck* v. *Federal Trade Commission*, 258 Fed. 307; *Federal Trade Commission* v. *Beechnut Packing Co.*, 257 U. S. 441, 42 Sup. Ct. 150).

In *Federal Trade Commission* v. *Eastman Kodak Co.*, 47 Sup. Ct. 688, at page 689, this Court thus defined the power of the Federal Trade Commission on a writ of certiorari reviewing the judgment of the Circuit Court of Appeals for the Second Circuit:

> "The proceeding before the Commission was instituted under Section 5 of the Federal Trade Commission Act, and its authority did not go beyond the provisions of that section. By these the Commission is empowered to prevent the using of 'unfair methods of competition' in interstate and foreign commerce, and, if, it finds that 'any unfair method of competition" is being used, to issue an order requiring the offender 'to cease and desist from using such method of competition.' The Commission exercises only the administrative functions delegated to it by the Act, not judicial powers. National Harness, etc., Association v. Federal Trade Commission (C. C. A.), 268 F. 705, 707; Chamber of Commerce v. Federal Trade Commission (C. C. A.), 280 F. 45, 48. It has not been delegated the authority of a court of equity. And a Circuit Court of Appeals on a petition to review its order is limited to the question whether or not

> it has properly exercised the administrative authority given it by the Act, and may not sustain or award relief beyond the authority of the Commission; such review being appellate and revisory merely, and not an exercise of original jurisdiction by the court itself."

The provisions of Section 316 of the Tariff Act are clearly modeled after the provisions of the act establishing and creating the Federal Trade Commission.

The mere fact, therefore, that the Tariff Commission operates in an administrative and not in a strictly judicial capacity does not of itself necessarily prevent a court from reviewing its action in an appellate capacity.

Prior to May 28, 1926, the United States Board of General Appraisers, from which appeals were expressly allowed by statute to the United States Court of Customs Appeals, was regarded in a sense as an administrative body, although exercising practically judicial functions. The members of the Board were regarded as officers of the Treasury Department, (1894) 21 *Op. Atty. Gen.* 85; *Waite* v. *Macy*, 246 U. S. 606, 31 Sup. Ct., p. 395. Its members were removable by the president without impeachment in Congress. *Erhart* v. *Ballin*, 150 Fed. 529. By Chapter 411 of Act of May 28, 1926, Sec. 1, 44 Stat. 669, they are now called "United States Customs Court" and the members are known as the "Chief Justices" and "Associate Justices." This act was passed because the name "Board of General Appraisers" was in fact a misnomer. They exercised practically only judicial functions and were hampered in its commissions to take depositions abroad, and because they were called a board and not a court, it was not regarded abroad as courts but as *officials* of lesser dignity.

It is not a constitutional court under Section 1, Article III, of the constitution, because members do not hold their offices during good behavior, but are removable by the act of the president for cause. They must therefore be regarded as administrative tribunals with powers of a court of limited jurisdiction.

Stone v. *Whitridge*, 129 Fed. 33;
Marine v. *Lyon*, 65 Fed. 992;
In re Van Blankenstein, et al., 56 Fed. 474;
Robertson v. *Boff*, 285 Fed. 911.

Nowhere do we find any decision challenging the power of the Customs Court of Appeals to review the decisions of the Board of General Appraisers, on the ground that they are mere administrative officers, *and indeed such reviews have been entertained in the court by certiorari.*

United States v. *Klingenberg*, 153 U. S. 93; 14 Sup. Ct. 790;
United States v. *Passavant*, 169 U. S. 16; 18 Sup. Ct. 219;
United States v. *Salambier*, 170 U. S. 621; 18 Sup. Ct. 771.

Attention of this Court is also called to the Revenue Act of 1926 which provides for a review of the decisions of the Board of Tax Appeals by the several United States Circuit Court of Appeals, and by the Court of Appeals of the District of Columbia—the residence of the taxpayer —in general, determining the venue. Provision for such review is set forth in Sections 1001, 1002, 1003 and 1004, of the Revenue Act, 44 Stat., Part II, pp. 109, 110), as follows:

"Sec. 1001. (a) The decision of the Board rendered after the enactment of the Act (except as provided in subdivision (j) of section 283 and in subdivision (h) of section 318) may be reviewed by a Circuit Court of Appeals, or the Court of Appeals of the District of Columbia, as hereinafter provided, if a petition for such review is filed by either the Commissioner or the taxpayer within six months after the decision is rendered.

(b) Such courts are authorized to adopt rules for the filing of such petition, the preparation of the record for review, and the conduct of proceedings upon such review and, until the adoption of such rules, the rules of such courts relating to appellate proceedings upon a writ of error, so far as applicable, shall govern.

(c) Despite the provisions of sections 274 and 308, such review shall not operate as a stay of assessment or collection of any portion of the amount of the deficiency determined by the Board unless a petition for review in respect of such portion is filed by the taxpayer, and then only if the taxpayer (1) on or before the time his petition for review is filed (and in any event before the expiration of six months after the decision of the Board is rendered) has filed with the Board a bond in a sum fixed by the Board not exceeding double the amount of the portion of the deficiency in respect of which the petition for review is filed, and with surety approved by the Board, conditioned upon the payment of the deficiency as finally determined, together with any interest additional amounts, or additions to the tax provided for by law or, (2) has filed a jeopardy bond under Title III or Title III of the Revenue Act of 1914 or of this act. * * *

Sec. 1003. (a) The Circuit Courts of Appeals and the Court of Appeals of the District of Columbia shall have exclusive jurisdiction to review the decisions of the Board (except as provided in section 239 of the Judicial Code, as amended); and the judgment of any such court shall be final, except that it shall be subject to review by the Supreme Court of the United States upon certiorari, in the manner provided in section 240 of the Judicial Code, as amended.

(b) Upon such review, such courts shall have power to affirm or, if the decision of the Board is not in accordance with law, to modify or to reverse the decision of the Board, with or without remanding the case for a rehearing, as justice may require.

Sec. 1004. (a) The Circuit Courts of Appeals, the Court of Appeals of the District of Columbia and the Supreme Court shall have power to impose damages in any case where the decision of the Board is affirmed and it appears that the petition was filed merely for delay."

The decisions of the Board of Tax Appeals, unless appealed from, become final in accordance with the provision of Section 1005 of the Revenue Act of 1926 (44 Stat., 110). The decisions of the Board of Tax Appeals are not only final by legislative declaration, but are final in fact, as they bind, in the absence of an appeal, both the taxpayer and the Commissioner of Internal Revenue as the representative of the Government of the United States.

In the case of *Avery* v. *The Commissioner of Internal Revenue*, 22 Fed. (2d) 6, the Court observes:

> "The first question to be considered is our jurisdiction to review a decision of the Board of Tax

> Appeals. The board was created by title 9 of the revenue act of 1924 and taxpayers were given the right to appeal to the board from decisions of the Commissioner of Internal Revenue determining a deficiency of taxes. After an adverse decision by the board the taxpayer *had no further remedy than to pay the taxes and sue to recover them*, the same as from an adverse decision of the commissioner, and by the statute creating it, section 900 (g), the findings of the board were made prima facie evidence of the facts therein stated in any suit or proceeding by the taxpayer. The board was continued as an independent agency in the executive branch of the Government by the revenue act of 1926, and by section 1003 of the said act the Circuit Court of Appeals were given jurisdiction to review its decisions.
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> It was undoubtedly the intention of Congress to create an independent board of experts to decide impartially between the Government and the taxpayer with the right to a final determination of the questions presented in a regularly constituted court before payment of the tax. It is consistent with that intention to say that it was not contemplated that the Courts of Appeals should be burdened with reviewing the mass of evidence usually submitted before a board charged with the duty of considering technical details."

The Court then proceeded to decide the case on the merits, from which it is evident that the Court was of the opinion that its jurisdiction had properly been invoked, and that it regarded the decision of the Board of Tax Appeals as a final judgment, thus constituting it a "case" or "controversy."

It is thus manifest that the mere fact that Congress has granted jurisdiction to a court to review the act of

an administrative body exercising judicial functions is not in and of itself objectionable. The test upon which such jurisdictions may be obtained is whether or not the matter litigated is a "case" or "controversy" within the meaning of the constitution.

By Chapter 74, Section 9, 27 Statutes 434, an appeal is given to any aggrieved party from the Commissioner of Patents refusing a patent, to the Court of Appeals of the District of Columbia.

In *United States ex rel.* v. *Duell*, 172 U. S. 576; 19 Sup. Ct. 286, Northall applied for a patent. Bernardin also applied for a patent to the Commissioner of Patents on the same invention. The Commissioner decided on priority in favor of Bernardin. Northall appealed to the Court of Appeals of the District of Columbia. That court awarded Northall priority and reversed the Commissioner's decision. Bernardin, notwithstanding, applied to the Commissioner to issue the patent to him, and tendered the final fee, but the Commissioner refused to do this in view of the decision of the Court of Appeals, which had been duly certified to him. Bernardin then applied to the Supreme Court of the District of Columbia for a mandamus to compel the Commissioner to issue the patent in accordance with his prior decision, on the ground that the statute providing for an appeal was unconstitutional, and the judgment of the Court of Appeals void for want of jurisdiction. The application was denied and Bernardin appealed to the Court of Appeals, which affirmed the judgment. The case was thereupon brought to this Court on a writ of error. This Court thus wrote:

> "Doubtless, as was said in Murray v. Land Co., 18 How. 284, congress cannot bring under the judicial power a matter which, from its nature, is not a subject for judicial determination; but at the

same time, as Mr. Justice Curtis, delivering the opinion of the court, further observed, 'There are matters involving public rights, which may be presented in such form that the judicial power is capable of acting on them, and which are susceptible of judicial determination, but which congress may or may not bring within the cognizance of the courts of the United States, as it may deem proper.' The instances in which this has been done are numerous, and many of them are referred to in Fong Ye Ting v. U. S. 149 U. S. 714, 715, 728, 13 Sup. Ct. 1016."

* * * * * * * * * *

"As one of the instrumentalities designated by congress in execution of the power granted, the office of commissioner of patents was created; and though he is an executive officer, generally speaking matters in the disposal of which he exercises functions judicial in their nature may properly be brought within the cognizance of the courts.

Now, in deciding whether a patent shall issue or not, the commission acts on evidence, finds the facts, applies the law, and decides questions affecting not only public but private interests; and so as to reissue or extension, or on interference between contesting claimants; and in all this he exercises judicial functions."

* * * * * * * * * *

"We agree that it is of vital importance that the line of demarkation between the three great departments of government should be observed, and that each should be limited to the exercise of its appropriate powers; but in the matter of this appeal we find no such encroachment of one department on the domain of another as to justify us in holding the act in question unconstitutional."

The test thus applied is whether or not they are matters involving public rights presented in such form that

the judicial power is capable of acting upon them and which is susceptible of judicial interpretation. Here we have the Tariff Commission of the United States as agents of the President on the one side, and the importers or consignees on the other. The matter litigated is whether or not the importers have unlawfully imported into the United States by unfair methods of competition or unfair acts certain articles of commerce. The matter involved is a matter of public right which can be validly adjudicated by the courts. As between the Tariff Commission and the importer the findings of the Commission are by statute expressly held to be conclusive, unless an appeal is taken. Upon such an appeal the statute provides that the judgment of the United States Court of Customs Appeals is final except as the same may be reviewed by this Court in the manner provided by statute. It is true that the United States Court of Customs Appeals is only expressly empowered to ascertain whether the evidence is sufficient to support the findings, and if insufficient, to demand that additional evidence be taken. It is also true that the court is not expressly empowered to affirm, reverse or modify the findings of the Tariff Commission if the taking of new evidence is not appropriated, but the statute further provides that the appeal shall be taken in the manner as appeals may be taken from decisions from the United States Board of General Appraisers.

Judicial Code, Sections 195, 196, 198, as amended, 28 U. S. C. A., Sections 308, 309, 310, confers exclusive appellate jurisdiction to review by appeal the latter decisions without expressly using language to indicate that it may reverse, modify or remand. While Congress did not expressly so provide, *it is clear however that such power is implied by the use of the language granting the appeal*

itself. We thus have a judgment between the parties affecting a proper subject matter.

It is argued that assuming that the Court would enter a judgment holding that unfair methods of competition exist or *vice versa*, there is no power in the statute to enforce such a judgment. While Congress did not provide a remedy in such a case it does not follow that such a remedy does not exist.

Let us suppose that Section 316 had stopped short and simply made it unlawful for importers to import articles by unfair methods of competition and unfair acts. It would follow that any Federal Court of competent jurisdiction could, by injunction, if the act were continuing in character, as alleged in the case at bar, restrain such unlawful conduct (*Bruhl* v. *Wilson*, 123 Fed. 957). It follows then that the mere fact that Congress has failed to provide an express remedy by the statute, creating the right does not mean that an implied remedy, such as will grant the relief or prevent the wrong, does not obtain.

Let us then suppose that the judgment of the Court holds, in the case at bar that no unfair methods of competition exist. Let us assume further that the Tariff Commission dissatisfied with the judgment of the Court reports to the president that in its opinion, nevertheless such unfair methods of competition do exist and recommends either the imposition of an additional tax or an embargo. Assuming that the president were nevertheless to act upon the advice of the Tariff Commission and direct the Secretary of the Treasury as the statute provides, to levy a tax or impose an embargo. Does it not follow then that the party aggrieved could by application to the Supreme Court of the District of Columbia secure an injunction restraining the Secretary of the Treasury from enforcing the presidential proclamation as a mere nullity and in excess of jurisdiction?

In *Marbury* v. *Madison*, 1 Cranch. 137, this Court held that the judiciary was not powerless to carry into effect its process against the executive branch of the Government when it proceeds in excess of jurisdiction. This proposition is so self-evident as not to require further elucidation.

But it may be said that assuming that the judgment of the United States Court of Customs Appeals is that unfair competition does exist and suppose the Tariff Commission makes a report in due course to the President and advises him of the judgment of that Court. Let us suppose further that the President declines arbitrarily to enforce such a judgment. What remedy is there then against the executive branch of the Government?

It may be that no Court could, by mandamus or injunction, act directly against the President. This question is an open one, and has never been directly before the Court for adjudication (see 38 *Corp. Jur.*, p. 684, Sec. 242). Where mandamus has been sought against the Chief Executive of a State, some Courts have held, that if the act sought to be performed is purely ministerial mandamus will lie (see 38 *Corp. Jur.* 662, Sec. 207), the reason for this view being:

> "To hold that the governor may set aside the laws at will in contrevention of the constitutional provision that he shall faithfully execute them would be a 'misconception, sarcasm, and travesty upon the organic act, upon which the state stands' " (*State* v. *Dickerson*, 33 Nev. 540, 570, 113 Pac. 105).

On the other hand, of course, mandamus will not issue where the duty or act to be performed is discretionary. In this case the President would have no discretion after the Court had entered its judgment.

It would therefore seem to follow that the President could be coerced in such a case by a court of competent jurisdiction.

On the other hand, assuming that coercion by mandamus or injunction directly against the President is unthinkable, as some authorities would seem to hold, nevertheless, the mere fact that the Court is unable directly to prevent executive usurpation of power in such a case would not render the judgment of the Court ineffective. A disregard of the judgment of a court of competent jurisdiction by the executive authority would certainly be strong ground for congressional action. Fortunately these troublesome questions are not before the Court in this matter, and are only discussed in order that it may be seen at once that the judgment is not purely advisory, but is binding upon the parties to the case.

The cases cited by the petitioner,

Postum Cereal Company, Inc. v. *California Fig Nut Company*, 272 U. S. 693;
Liberty Warehouse Co. v. *Grannis*, 273 U. S. 428;
Muskrat v. *United States*, 219 U. S. 346,

are all without application and to the facts here stated.

The *Postum* case, *supra*, arose in the following manner: Postum Cereal Company, Inc., procured the registration of a trade mark under the name of "Grape Nuts". The California Fig Nut Company secured registration of a trade mark under the name of "Fig Nuts". Under the statute any person deeming himself injured by the registration of a trade mark has a right to apply to the Commissioner of Patents to cancel it. Upon due notice to the registrant, a hearing is given before an Examiner of Interferences in the Patent Office, with right

of appeal to the Commissioner of Patents. It is to be noted that no appeal was given from the decision of the Commissioner of Patents to the courts, as it was expressly given in a patent dispute under Section 9 of the Act of February 20, 1905. The Commissioner decided against the Postum Company, and held that it was not injured by the registration of the trade mark "Fig Nuts". An appeal was taken to the Court of Appeals of the District of Columbia. That Court held that in absence of express legislation giving such right of appeal, no such right existed.

Thereupon, the case was taken to this Court. This Court pointed out that by the trade mark legislation the decision of the Commissioner of Patents as to whether or not the registration of a trade mark should or should not be cancelled was binding on no one, and that the decision of the Commissioner holding that the trade mark interferes with that of another was not *res adjudicata* against action between the two contesting parties in a court of law.

The Court showed that under these circumstances the judgment of the Circuit Court of Appeals or of this Court would be advisory only, and would not be conclusive on any of the parties.

Said this Court: "It is merely an instruction to the Commissioner of Patents by a court which is made part of the machinery of the Patent Office for administrative purposes. In the exercise of such function it does not enter a judgment binding parties in a case as the term case is used in the third article of the Constitution."

It is thus clear that the reason for the refusal of the Court to entertain the case was not based upon the fact that the appeal involved a review of an administrative decision, but was because that administrative decision

was binding upon no one and was not final or conclusive upon the parties.

In the case at bar, on the other hand, by the express provision of the statute, the findings and conclusions in judgment of the Court of Customs Appeals is binding and conclusive upon all concerned. The matter, as we have noted, involves one of public right which is presented in such form that judicial power is capable of acting thereon.

In the *Muskrat* case, Congress, by the act passed March 1, 1907 (part of the Indian Appropriation Bill), 34 Stat. at L. 1015, 1028, Chap. 2285, endeavored to confer authority upon the Court of Claims to determine the constitutional validity of certain statutes affecting Indian lands. It appeared that Congress, in 1902, by act of September 1st of that year, undertook to allot certain lands amongst members of the Indian tribes, and subsequently, by Act of April 26, 1906, changed the allotment by increasing the number of persons entitled to participate in the division of such lands by permitting the enrollment of children who were minors on March 4, 1906, whose parents had then been enrolled as members of the Cherokee tribe, or had applications pending for that purpose.

The Congress apparently was uncertain as to the validity of this last mentioned legislation and by the act of March 1, 1907, undertook to confer jurisdiction upon the Court of Appeals with right of appeal by either party to the Supreme Court of the United States to hear, determine and adjudicate such suits.

The statute further provided in effect that if the final judgment denied the validity of the acts and rendered judgment in favor of persons authorized to commence such suits, the attorneys' fees fixed by the court, were to

be paid out of the Treasury of the United States belonging to the beneficiaries under act of July 1, 1902.

In pursuance of this legislation, the actions were commenced, this court, however, declared the act unconstitutional since in fact it was an action for declaratory judgment which bound no one as it could not have been *res adjudicata* upon the actual allottees and was practically an advisory opinion.

It is to be noted that the matter arose in the forms as would any other cause arise between a complainant and a defendant. The form in which the cause arose was not considered as important as was the question as to whether the Court had the right to express advisory opinions upon which the judicial power of the Government was incapable of enforcing.

Here, again, we find sharp distinction to be drawn between that cause and the one at bar. While this cause did not arise between a plaintiff or complainant and a defendant, there are parties to the dispute and the matter involved is the question as to whether or not the importers have violated the provisions of the Tariff Act by importing articles by unfair methods of competition or unfair acts and the adjudication by the Court that such acts were or were not committed would constitute a valid adjudication as between the parties to the litigation for all time on that question, and would be binding as we have shown by the executive department of the Government as well as the importers and consignees.

We have already shown that the power is not lacking in the courts for the enforcement of such a finding. This case would, therefore, fall within the definition of judicial power as found by Mr. Justice Miller, quoted with approval by Mr. Justice Day in the *Muskrat* case, *supra*.

The case of *Liberty Warehouse Co.* v. *Grannis, supra,* relied upon by the petitioner, arose on the law side of the Federal District Court for Eastern Kentucky, and presumably the jurisdiction of that Court was invoked because of the diversity of citizenship of the parties. The Legislature of Kentucky, by acts of 1922, ch. 23, passed the Declaratory Judgment Law, and in accordance with said act and the Federal statute of conformity, relief against Chapter 10 of the Kentucky Acts of 1924 regulating the sale of leaf tobacco at public auction was sought by asking the Court to declare that the act of the Legislature was unconstitutional and void and in violation of the commerce clause and equal protection clause of the Constitution, as well as clauses contained in the Fourteenth Amendment.

Here, again, this Court reiterated its position that the Federal Courts have no jurisdiction to entertain suits for declaratory judgments in the absence of proper parties to the litigation and a subject matter which would result in a binding and enforceable judgment having the effect of *res adjudicata* in subsequent litigation.

This, of course, in no sense involves a mere declaratory judgment, but is in a true sense a litigation which is binding and enforceable as we have already noted.

Summary.

It must be concluded, if the *entire statute is not violative of the organic law:*

1. That a case or controversy may arise between parties litigant before an administrative body. The mere fact that a justiciable controversy is in the first instance relegated to administrative officers is in itself no reason

why the courts may not review the decisions or finding of such officials.

2. That the statute contemplates the existence of a controversy between the Tariff Commission or importers or consignees, etc.

3. That the matter to be adjudicated is the question as to whether or not the importers have imported articles in the United States by unfair methods of competition or unfair acts, the tendency of which is to destroy efficiently and economically operated industries of the United States.

4. That such findings are reviewable by an inferior court established under the Constitution for the reason that the same involves a case or controversy upon which the judicial power is capable of acting because:

A. The findings or judgment is conclusive and binding upon the importers and consignees as well as the Tariff Commission and executive department of the Government.

B. That the judgment may be enforced when adverse to the importer by the imposition of an increased rate of duty or embargo as the case may require, and if in favor of the importer or consignee may be enforced against the Government by proper proceedings in the nature of mandamus or injunction as the case may require.

POINT II.

If the statute is in part unconstitutional the whole must be struck down.

If this Court were to hold, notwithstanding the arguments above set forth, that the matter does not involve a case or controversy within the meaning of the constitution, therefore, no right of appeal is accorded the importer or consignee, we respectfully suggest that this Court should not leave the importer in that position without in some way indicating that the whole statute is void and that no rights thereunder can validly be obtained by the Bakelite Corporation.

The Congressional Debate in the Appendix indicate clearly that this action never would have received the sanction of Congress had there not been scrupulous attempt to protect the rights of the importer or consignee. It is the well-settled principle of constitutional law requiring no citation of authority in this Court that where a statute is unconstitutional in part and that *part is further interwoven and interconnected with such part thereof*, as might have nevertheless been valid and it clearly appears that Congress would never have enacted the one without including the other, the whole statute must be condemned. Such a case would thus be presented here.

Moreover, we have shown that if unrestrained discretion is vested in the executive to issue embargo and fix rates of duty and that the judgment of the courts which Congress had chosen as the vehicle to restrain that discretion, is not binding upon the executive, then the whole statute falls within the principle that Congress cannot

delegate such functions to the executive as it would then be purely law-making and could constitute an abdication of the constitutional duty of Congress.

For both of these reasons the whole statute would be violative of the constitution.

If this Court were merely to strike down in this proceeding the clause granting right of appeal and say nothing more with respect to the validity of the remaining legislation, endless, protracted and expensive litigation would ensue. Undoubtedly, the findings of the Tariff Commission would be made final by the President, and the question as to whether the embargo or increased rate of duty is valid would have to be litigated through the United States Customs Court, and back to the United States Court of Customs Appeals and then to this Court. Or in the alternative the importers might be driven to an action for injunctive relief which would ultimately find its way here after a lapse of many years and incalculable harm and injury to the business of the importer and endless expense.

For these reasons, if no other, we respectfully suggest that this Court should in the event that it is convinced that the statute is unconstitutional, pronounce the whole thereof inoperative and void.

POINT III.

The rule should be discharged and petition dismissed.

Respectfully submitted,

MEYER KRAUSHAAR,

Counsel for Importers.

APPENDIX.

Extract from Congressional Record, August 11, 1922, pages 11241 to 11244, Sixty-second Congress, Part II, Second Session.

Mr. McCumber. Mr. President, I present on behalf of the committee certain amendments to the amendments which have been proposed by the committee, which I ask may be read. I think it will not be necessary to read them all except as they are offered, and I will now offer the first one on the list.

The Presiding Officer. The Secretary will state the amendment to the amendment.

The Reading Clerk. On page 277, line 5, after the word "section," it is proposed to strike out "jurisdiction is hereby conferred upon the executive department or independent establishment of the Government, or both acting in co-operation, which he shall designate," and to insert in lieu thereof the words "the United States Tariff Commission is hereby authorized."

Mr. McCumber. Mr. President, I will state generally that subdivision (a) of section 316 provides that unfair methods of competition and unfair acts in the importation of merchandise the tendency of which is to destroy or substantially injure any industry efficiently and economically operated in the United States or to prevent the establishment of such an industry or to restrain or monopolize trade and commerce in the United States is declared to be unlawful. Subdivision 2 of section 316 authorizes the imposition of penalty duties or the prohibition of the importation of particular merchandise for the purpose of preventing unfair methods of competition in such importation. Subdivision (b) as originally reported to the Senate authorized the President to select the agency to investigate any alleged violation of the section. The amendment now offered specifies that the Tariff Commission shall make the investigation.

That, Mr. President, substantially states the purpose of the several minor amendments which I have sent to the desk.

Mr. Walsh of Montana. Mr. President, I express the hope that this section may be disposed of quite speedily. I desire, however, to call attention to one or two features of it, and particularly to explain what the section is about. Some time ago I summarized the provision as follows:

> The President is authorized to inquire into unfair methods of competition and unfair acts on the part of any owner, importer, consignee, or agent of either, in respect to either the importation of any merchandise or the sale of such as is imported, "the effect or tendency of which is to destroy or substantially injure an industry or to restrain or monopolize trade and commerce in the United States," utilizing for such inquiry any existing agency of Government—

Now, the Tariff Commission is the agency to be used—

> and finding such method to exist, or acts to have been committed, to impose such an additional duty, not to exceed 50 per cent of that fixed by the bill, as will "offset such method or acts," or, "in extreme cases," he may direct that "as he shall deem the best interests of the United States shall require," such merchandise "shall be excluded from entry," such direction to have the force of law.

I need not say that upon principles of the law frankly conceded upon the other side of the Chamber this section cannot possibly be sustained as a constitutional exercise of the power of Congress; but I do not care to debate that matter now. What I want to call your attention to is this: If the Tariff Commission shall find that these unfair practices are being pursued, relief is given to the person whose interests are affected through judicial re-

view. He may go before the Court of Customs Appeals and protest against the decision of the President in the matter, and, if his action is not justified, it may be annulled. He may even go to the Supreme Court of the United States by appeal from the decision of the President in that matter, indicating what I insisted time and again upon this floor, that whenever this delegation of power is given there must be given an opportunity for review in the courts. The principle is acknowledged in this part of the bill; but I pass that.

> Whenever the existence of any such unfair method or act shall be established to the satisfaction of the President, he shall determine the rate of additional duty, not exceeding 50 nor less than 10 per cent of the value of such merchandise as defined in section 402—

And then he imposes those duties.

Mr. President, I daresay that the President of the United States is as accomplished a mathematician as the ordinary Member of this body; but how he is going to convert into a rate of duty the offense committed by importers or dealers in imported articles so as to offset by his rate of duty the evil that is thus perpetrated is a problem which I shall not undertake to solve. I merely call attention to the matter in passing.

He may not only impose this speculative duty which is thus arrived at, however, but in extreme cases he may declare that that merchandise shall be excluded from the United States entirely. Just exactly what is an extreme case, or a moderate case, or a mild case, we are left merely to speculate. Of course, this gives to the President the power to impose any duty he sees fit, or to exclude the merchandise altogether if he sees fit. In other words, the discretion vested in the President by section 315 is made perfectly obvious and indisputable under the provisions of section 316.

But that is not the worst of this, Mr. President. You will observe that it provides at the outset:

> That unfair methods of competition and unfair acts in the importation of merchandise into the United States, or in its sale by the owner, importer, consignee, or agent of either, the effect or pendency of which is to destroy or substantially injure an industry, efficiently and economically operated—

Are declared to be unlawful, and to be punished or prevented in the manner that is indicated. Of course, that means something in the nature of a continuing custom or practice or regular habit of the people who are engaged in the importation of that particular commodity. Then the President may impose a duty upon further importations. But wait:

We have half a dozen foreign importers engaged in these wrongful acts, and we have half a dozen other importers in this country, highly honorable, reputable business men, who are denouncing these acts, and insist that they ought not to be continued. A duty of anywhere from 10 to 50 per cent is thereupon imposed upon the importation of that kind of commodity, to be paid by the honest, law-abiding importers and merchants engaged in the selling of imported merchandise just exactly the same as by the wrongdoer who gave rise to the action of the President, or, in extreme cases, the man's business is to be utterly ruined when he has been endeavoring to do the best he can to carry on his business in a legitimate and an honorable way.

Mr. Pomerene. Mr. President—

The Presiding Officer. Does the Senator from Montana yield to the Senator from Ohio?

Mr. Walsh of Montana. I do.

Mr. Pomerene. It can be assumed that these tariff duties, like the rain, fall on the just and the unjust alike.

Mr. Walsh of Montana. I have said all I care to say about this section, Mr. President.

Mr. McCumber. Mr. President, I assume, from the standpoint of the Senator from Montana, that the fiction of the Democratic Party still holds good that a Demo-

cratic administration can do no wrong, and that any law that is passed by such administration is a very proper law.

In comparison with the powers that are given to the President under section 316, I want to read the power that was given to the President under the law of 1916. Taking section 804 as the standard, it provides:

> That whenever any country, dependency, or colony shall prohibit the importation of any article the product of the soil or industry of the United States and not injurious to health or morals, the President shall have power to prohibit, during the period such prohibition is in force, the importation into the United States of similar articles, or in case the United States does not import similar articles from that country, then other articles the products of such country, dependency, or colony.

He is not limited in the selection of those articles. He is not limited in the number of those articles. If you were to give this the broadest construction, if there were three American articles prohibited from entering that foreign country, the President would have a right under this to prohibit anything coming from that foreign country to the United States. Absolutely unlimited was the power given to President Wilson.

Now let us take the next section, section 805:

> That whenever * * * the President shall be satisfied that there is reasonable ground to believe that under the laws, regulations, or practices of any country, colony, or dependency contrary to the law and practice of nations—

He is to determine that—

> the importation into their own or any other country, dependency, or colony of any article the product of the soil or industry of the United States and not injurious to health or morals is prevented

or restricted the President is authorized and empowered to prohibit or restrict during the period such prohibition or restriction is in force, the importation into the United States of similar or other articles, products of such country, dependency, or colony as in his opinion the public interest may require—

Think of that broad power—"as in his opinion the public interest may require"—

and in such case he shall make proclamation stating the article or articles which are prohibited from importation into the United States; and any person or persons who shall import, or attempt or conspire to import, or be concerned in importing, such article or articles, into the United States contrary to the prohibition in such proclamation, shall be liable to a fine of not less than $2,000 nor more than $50,000, or to imprisonment not to exceed two years, or both, in the discretion of the court. The President may change, modify, revoke, or renew such proclamation in his discretion.

Mr. President, no court has challenged that that I know of. It was not a war power, because it was a power given before we entered the war. The provision in section 316 is guarded in every respect as carefully as we have guarded the provisions of section 315 as to the hearings, as to the body which shall furnish the President the information, and so forth.

Mr. Spencer. Mr. President, I ask that the Secretary read the proposed amendment.

The Presiding Officer (Mr. Jones of Washington in the chair). The Secretary will state the amendment.

The Assistant Secretary. On page 277 of the bill it is proposed to strike out all of the matter beginning with the word "jurisdiction," in line 5, down to and including the word "designate," in line 8, or the following words:

Jurisdiction is hereby conferred upon the executive department or independent establishment of the Government, or both, acting in co-operation, which he shall designate.

And to insert in lieu thereof the words:

The United States Tariff Commission is hereby authorized.

Mr. Spencer. Mr. President, up to the present time the Tariff Commission has been confined entirely to research and examination. When it makes its examination into any question which the tariff may eventually affect, either side uses the result of that research for their own information. Sometimes those who are opposed to a protective tariff find much to support their position in the report of the Tariff Commission. Sometimes those of us who believe in a protective tariff find much to support our position.

I want to say that if this amendment carries it means the beginning of the end of the Tariff Commission, because for the first time we will put upon the Tariff Commission the responsibility, not of research, not of investigation, not of furnishing information only, but we will put upon them the responsibility of determining what rates ought to be placed upon any given commodity.

The result will be that when the return of the Tariff Commission on any rate is made and their report comes in from one side or the other of this Chamber there will be opposition. When you inject the Tariff Commission into the political differences over the tariff you spell the beginning of the end of the Tariff Commission. It is proposed to give to them now for the first time the right not only of examination, not only of research, but to themselves announce what they think ought to be the rate. That means that if they venture their opinion with regard to a rate which leans toward a tariff for revenue only, I am against it. It means, on the other hand, that if they announce an opinion which leans toward a pro-

tective tariff, men upon the other side are against it, and every action of the Tariff Commission will be either attacked or supported in this Chamber in accordance with the opinions of the Members on the question of the tariff itself. That will end the usefulness of the Tariff Commission.

I have only one thing else to say, and that is that it is a bad policy to allow those who make the investigation by way of research to act at the same time in a judicial capacity to determine what ought to be done, because when a body investigates merely for information they are independent, they do not let the chips fall where they will; they are seeking for light, and they gather the facts as they are and present them.

If you substitute for that condition a Tariff Commission which gathers information and then ventures its opinion, its recommendation, its finding, its fixing of rates, what is the result? The next time the Tariff Commission investigates that subject upon which they have already fixed their rates they are bound to direct their investigation so as to support their findings, and they will have lost their impartial character. They can no longer be depended upon as an impartial body of research and investigation; they will have become a political factor in the making of the tariff, and that will end their usefulness.

Mr. Frelinghuysen. Mr. President, the fundamental rule is laid down as to how these facts shall be found and comparisons made, based entirely upon competitive conditions. How can the Tariff Commission adopt any policy of a tariff for revenue only? The proposition, and it is not very persuasive to me to say that between two conditions, and it has not resulted in political influence or any particular tariff policy in any other country which imposes tariffs, and places the responsibility of making a rate on a commission where they lay down the fundamental principle upon which the rates shall be levied.

Mr. Spencer. Does not the Senator see the difference between an impartial, independent commission, which

shall gather information and give the result of what they find, and another commission which itself passes upon the rate, and which, of course, must sustain its findings, so that in the latter case all its subsequent research lacks the character of independence and is directed toward the establishment of the correctness of the finding which they have already made? You will change the whole character of the Tariff Commission; you will change it from an independent body of research, of investigation, of information into a political agency, and you will spell the end of the Tariff Commission.

Mr. Frelinghuysen. Will it be any more of a political body than a committee of Congress trying to base their findings upon inaccurate information and upon no rule whatsoever?

Mr. Lenroot. Mr. President, I have no objection to the amendment which has been proposed, but I do want to say a word in connection with the subject matter to which the amendment relates. I agree with the Senator from Montana in his views concerning the validity of the section, and it is not very persuasive to me to say that because a Democratic law gave to the President power which I do not believe Congress had any constitutional authority to give him therefore a Republican proposed law is made valid.

Of course, the chairman of the committee will admit that the sections to which he has referred have never been brought into question, because the President has never exercised the power sought to be conferred by them. I have no question whatever that the Congress has the power, if the President finds that another country has discriminated against us in any way, to authorize him to proclaim an embargo upon the importation of any article exported from that country to this country; but the law which has been referred to permits the President to select articles of merchandise or commodities upon which he may create an embargo and admit others. That, it seems to me, is clearly an exercise of legislative authority, which cannot be delegated.

So, under the amendment now proposed, if one importer has indulged in unfair competition, and a finding to that effect is sustained and reported to the President, because one importer has been guilty of wrongdoing the President may fix rates from 10 to 50 per cent ad valorem upon all merchandise, either of that character or any different character.

Mr. Reed. Let me ask the Senator whether, in the case he has just put, it would not be much wiser if we provided penalties to be visited upon the particular importer who violated the proper practices, and reach it in that way, instead of reaching it by excluding everybody?

Mr. Lenroot. I think that is the way to reach it. The Senator from Utah has just called my attention to one of the amendments which is intended to be proposed, which will limit it to merchandise imported in violation of this act. Do I understand from the Senator from Utah, then, that it will not be a general rate imposed upon all merchandise but will be a rate imposed upon merchandise imported by a given individual who is guilty of violation of the act?

Mr. Smoot. That is all there is to it, Mr. President. The criticism the Senator has just offered to the original paragraph is absolutely correct. Under that, if there had been one violation the President could have imposed the extra duty upon all importations, by any and every person, of that kind of merchandise, and that is why the committee is going to offer this amendment.

Mr. Lenroot. I am very frank to say that that very greatly improves the section.

Mr. Walsh of Montana. Mr. President, I merely desire to say, before the vote is taken, that, as remarked by the Senator from Wisconsin, I do not consider it any answer to the objection made to this section to say that at some other time Congress passed another law which was equally obnoxious. Nor do I feel at all subject to the imputation of accepting as within the bounds of the Constitution every act passed by a Democratic Congress and during a Democratic administration, and finding fault with similar acts passed in a Republican administration.

I have had no opportunity to examine the statute to which the Senator from North Dakota makes reference. In some of its featuers, at least, it is easily sustained by the case of Field against Clark. I do not undertake to state, however, that it could be sustained by that decision nor that it could be sustained at all. Indeed, in the case of Field against Clark the Supreme Court referred to many statutes which had been passed which seemed to confer upon the President discretionary power. They merely so remarked, without undertaking to say that upon an inquiry into any particular one of those statutes it might not be found to be violative of the Constitution. That seems to be no answer at all to the argument.

Here follow record of vote and copy of measure.

Statute Under Consideration.

Unfair methods or acts declared unlawful.

SEC. 316. (a) That unfair methods of competition and unfair acts in the importation of articles into the United States, or in their sale by the owner, importer, consignee, or agent of either, the effect or tendency of which is to destroy or substantially injure an industry, efficiently and economically operated, in the United States, or to prevent the establishment of such an industry, or to restrain or monopolize trade and commerce in the United States, are hereby declared unlawful, and when found by the President to exist shall be dealt with, in addition to any other provisions of law, as hereinafter provided.

Tariff Commission to investigate.

(b) That to assist the President in making any decisions under this section the United States Tariff Commission is hereby authorized to investigate any alleged violation hereof on complaint under oath or upon its initiative.

Hearings to be afforded; Findings of facts to be conclusive; Questions of law subject to review.

(c) That the Commission shall make such investigation under and in accordance with such rules as it may promulgate and give such notice and afford such hearing, and when deemed proper by the Commission such rehearing with opportunity to offer evidence, oral or written, as it may deem sufficient for a full presentation of the facts involved in such investigation; that the testimony in every such investigation shall be reduced to writing, and a transcript thereof with the findings and recommendation of the commission shall be the official record of the proceedings and findings in the case, and in any case where the findings in such investigation show a violation of this section, a copy of the findings shall be promptly mailed or delivered to the importer or consignee of such articles; that such findings, if supported by evidence, shall be conclusive, except that a rehearing may be granted by the Commission, and except that, within such time after said findings are made and in such manner as appeals may be taken from decisions of the United States Board of General Appraisers, an appeal may be taken from said findings upon a question or questions of law only to the United States Court of Customs Appeals by the importer or consignee of such articles; that if it shall be shown to the satisfaction of said court that further evidence should be taken, and that there were reasonable grounds for the failure to adduce such evidence in the proceedings before the Commission, said court may order such additional evidence to be taken before the Commission in such manner and upon such terms and conditions as to the court may seem proper; that the commission may modify its findings as to the facts or make new findings by reason of additional evidence, which, if supported by the evidence, shall be conclusive as to the facts except that within such time and in such manner an appeal may be taken as aforesaid upon a question or questions of law only; that the judgment of said court shall be final, except that the same shall be sub-

ject to review by the United States Supreme Court upon certiorari applied for within three months after such judgment of the United States Court of Custom Appeals.

Findings to go to President.

(d) That the final findings of the commission shall be transmitted with the record to the President.

Additional duties to offset unfairness; Exclusion of articles from entry.

(e) That whenever the existence of any such unfair method or act shall be established to the satisfaction of the President he shall determine the rate of additional duty, not exceeding 50 nor less than 10 per centum of the value of such articles as defined in section 402 of Title IV of this Act, which will offset such method or act, and which is hereby imposed upon articles imported in violation of this Act, in what he shall be satisfied and find are extreme cases of unfair methods or acts as aforesaid, he shall direct that such articles as he shall deem the interests of the United States shall require, imported by any person violating the provisions of this Act, shall be excluded from entry into the United States, and upon information of such action by the President, the Secretary of the Treasury shall, through the proper officers, assess such additional duties or refuse such entry; and that the decision of the President shal be conclusive.

Entry under bond.

(f) That whenever the President has reason to believe that any article is offered or sought to be offered for entry into the United States in violation of this section but has not information sufficient to satisfy him thereof, the Secretary of the Treasury shall, upon his request in writing, forbid entry thereof until such investigation as the President may deem necessary shall be completed: *Provided*, That the Secretary of the Treasury may permit entry under bond upon such conditions and penalties as he may deem adequate.

In the Supreme Court of the United States

OCTOBER TERM, 1928

No. —, ORIGINAL

Ex Parte: IN THE MATTER OF THE BAKELITE Corporation, petitioner

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RETURN OF THE PRESIDING JUDGE AND ASSOCIATE JUDGES OF THE UNITED STATES COURT OF CUSTOMS APPEALS

To the Honorable The CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

William J. Graham, Presiding Judge, and Oscar E. Bland and Charles S. Hatfield, Associate Judges of the United States Court of Customs Appeals, do hereby make return to the rule to show cause issued herein on the eighth day of October, 1928, why a writ of prohibition should not issue to restrain them from entertaining the appeal from the findings and recommendations of the United States Tariff Commission in a cause entitled "In the Matter of The Investigation of alleged unfair methods of competition and unfair acts in the importation and sale of Synthetic Phenolic Resin, Form C, and

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articles made wholly or in part thereof. Frischer & Co., Inc., Randes Importing Company, Transatlantic Clock & Watch Co., Inc., Western Briar Pipe Company, National Council of Importers & Traders, Inc., Appellants, Bakelite Corporation, Abse Brothers, Embed Art Corporation, Kaufmann Bros. & Bondy, Reiss-Premier Pipe Company, S. M. Frank & Co., Inc., Wm. Demuth & Company, L. & H. Stern, Inc., Appellees," and why they should not cancel and annul the judgment order entered by them in said cause May 25, 1928, denying a motion to dismiss an appeal therein, and they respectfully answer and certify as follows:

1. The United States Court of Customs Appeals obtained its supposed jurisdiction of the litigation involved herein in the following manner:

On the 16th day of December, 1925, the Bakelite Corporation, a Delaware corporation, having its principal place of business in the city of New York, Abse Brothers, a partnership, having its principal place of business in Brooklyn, New York, and the Embed Art Corporation, a New Jersey Corporation, having its principal place of business at Perth Amboy, New Jersey, filed with the United States Tariff Commission a complaint under oath asking relief under Section 316 of Title III of the Tariff Act of 1922 from unfair competition in the importation and sale of beads of all kinds and materials or articles made of Synthetic Phenolic Resin or "Bakelite." The basis of this complaint was that articles made from Synthetic Phenolic Resin were

being imported into the United States in violation of the patent rights of the Bakelite Corporation, which was alleged to constitute unfair methods of competition under said Section 316. A hearing was had before the United States Tariff Commission on this complaint, at which time the complainant and certain interested importers were fully heard. Following this, on the 16th day of April, 1926, the United States Tariff Commission issued an order recommending that the President request the Secretary of the Treasury to forbid entry of such Synthetic Phenolic Resin pending an investigation by such Commission, in pursuance to the provisions of said Section 316. An order to that effect was duly issued on April 26, 1926, by the Assistant Secretary of the Treasury. Afterward, on May 25, 1927, a final order was entered in said proceeding by the said Tariff Commission excluding the importations in question from entry into the United States. Thereupon, on July 8, 1927, Fri.cher & Co. (Inc.), Randes Importing Company, Transatlantic Clock & Watch Co. (Inc.), and Western Briar Pipe Company, claiming to be persons interested, filed a petition for review in the United States Court of Customs Appeals, under and by virtue of the provisions of said Section 316, subsection (c). A transcript of the record in said cause was filed in the October Term, 1927, of said court, and thereafter the matter came on to be heard upon the motion of the Bakelite Corporation to dismiss the said appeal, it being alleged therein

that the said United States Court of Customs Appeals had no jurisdiction of the subject matter. Upon consideration of said motion the said court held that it did have such jurisdiction, refused to dismiss the appeal, set the cause for hearing on its merits, and filed an opinion setting forth its reasons for such action, a true copy of which opinion, marked "Exhibit A," is attached to and is made a part of the petition for a writ of prohibition filed in this Court. This is the present status of the cause in the United States Court of Customs Appeals. No hearing upon the merits has been had and no final judgment entered.

2. The United States Court of Customs Appeals has taken jurisdiction of the appeal, believing (*a*) that the United States Court of Customs Appeals is a court of the United States created and existing under Article III of the Constitution of the United States, (*b*) that the litigation in question constitutes a case or controversy within the meaning of Article III of the Constitution of the United States.

The ideas of the Judges of the United States Court of Customs Appeals on this subject are fully developed and set forth in its opinion, copy of which is made a part of the petition for writ of prohibition herein.

The Bakelite Corporation, which now seeks a writ of prohibition, invoked the jurisdiction of the United States Tariff Commission under Section 316 of Title III of the Tariff Act of 1922,

and having obtained relief in said proceeding now seeks to prevent the United States Court of Customs Appeals from reviewing the order granting such relief, in accordance with the provisions of Section 316 of Title III of the Tariff Act of 1922.

And these are the reasons which respondents offer why a writ of prohibition should not issue as prayed for.

Your respondents respectfully submit to the judgment of this Honorable Court.

WILLIAM J. GRAHAM,
Presiding Judge.

OSCAR E. BLAND,

CHARLES S. HATFIELD,
Associate Judges.

WASHINGTON, D. C., *October 29, 1928.*

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